Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-63

CHARLES O. ROSS,

Petitioner,

v.

HONORABLE FRANK REDA, Judge,
Franklin County Municipal Court,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS OF PETITION

	Page
TABLE OF CASES AND AUTHORITIES-----	iii
CITATION TO OPINIONS BELOW --------	2
JURISDICTION ----------	2
QUESTIONS PRESENTED FOR REVIEW ----	3
CONSTITITIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED ----------	5
STATEMENT OF THE CASE ----------	5
REASONS FOR GRANTING THE WRIT -----	18
I. THE PETITION PRESENTS FOR REVIEW AN IMPORTANT CONSTITUTIONAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT AS TO WHICH THERE IS A CLEAR CONFLICT AMONG THE CIR-CIRCUITS -- NAMELY THE SCOPE OF A COURT'S POWER TO REFUSE PRO HAC VICE ADMISSION TO OUT-OF-STATE COUNSEL IN GOOD STANDING WHERE THE EFFECT ON SUCH REFUSAL IS TO DENY TO AN ACCUSED IN A CRIMINAL TRIAL THE RIGHT TO RETAINED DEFENSE COUNSEL OF HIS CHOICE. ----------	18
II. THE PETITION PRESENTS FOR REVIEW AN IMPORTANT CONSTITUTIONAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT AS TO WHICH THERE IS CLEAR CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS -- NAMELY, THE SCOPE OF A COURT'S POWER TO LIMIT EXTRA JUDICIAL COMMENT BY AN ATTORNEY BY A GENERAL RULE WITHOUT A FINDING OF NECESSITY IN A PARTICULAR CASE AND WITHOUT A SHOWING THAT THE ADMINISTRATION OF JUSTICE OR A FAIR TRIAL IS THREATENED. ----------	28

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Page

III. THE PETITION PRESENTS FOR REVIEW AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW DECIDED BY THE CIRCUIT COURT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT -- NAMELY WHETHER A CONVICTION MAY BE SUSTAINED BY AN APPELLATE COURT UPON GROUNDS DIFFERENT FROM THOSE STATED BY THE TRIAL COURT WHERE THE DEFENDANT'S TRIAL STRATEGY WAS GOVERENED BY THE ACTIONS OF THE TRIAL COURT. ---------- 31

IV. THE CASE PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY WHETHER AS A MATTER OF DUE PROCESS OF LAW, A JUDGE SUBSTITUTED FOR ANOTHER WHO HAS BEEN DISQUALIFIED FOR PREJUDICES IS REQUIRED TO CONSIDER DE NOVO ALL RULINGS OF HIS PRODECESSOR MADE AFTER AN AFFIDAVIT OF PREJUDICE WAS FILED. ---------- 45

TABLE OF CONTENTS OF THE APPENDIX

First Amendment,
Constitution of the United States-- 1a

Fifth Amendment,
Constitution of the United States-- 1a

Sixth Amendment,
Constitution of the United States-- 2a

Fourteenth Amendment, Section 1
Constitution of the United States-- 2a

Page

28 U.S.C. §2254 ---------- 3a

Ohio Revised Code, §§2909.21, 2901.25, 2923.43 ---------- 5a

Canon 7, EC 7-33 of Code of Professional Responsibility adopted by the Supreme Court of Ohio--------- 7a

Disciplinary Rules, Dr. 7-107B, C and D of the Code of Professional Responsibility, adopted by the Supreme Court of Ohio ---------- 7a

Opinion of the United States Court of Appeals for the Sixth Circuit dated February 13, 1975 ---------- 11a

Opinion of the United States District Court for the Southern District of Ohio, Eastern Division dated June 6, 1974 ---------- 14a

Opinion of the Court of Appeals of Franklin County dated March 20, 1973 ---------- 39a

Opinion of the United States Court of Appeals for the Seventh Circuit dated October 1, 1973 in Banks v. Holder ---------- 71a

TABLE OF CASES AND AUTHORITIES

Adams v. United States ex rel. McCann, 317 U.S. 269, 270 (1942) --------- 37

Anderson v. Nelson, 432 F.2d 55 (9th Cir., 1970) ---------- 49

Page

Argersinger v. Hamlin, 407 U.S. 25 (1972) ---------- 18, 37

Banks v. Holder, U.S. Court of Appeals for the Seventh Circuit, unreported, No. 73-13332 (71a)---- 21, 25, 26

Bouie v. Columbia, 378 U.S. 347 (1964) ---------- 36

Bridges v. California, 314 U.S. 252 (1941) ---------- 30

Brinkerhoff-Faris T. and S. Co. v. Hill, 281 U.S. 673 (1930) -------- 36

Brown v. Woods, ___Ark. ___, 516 S.W. 2d 98 (1974, dissent), cert. den. 95 S.Ct. 1951 (1975) -------- 22

United States ex rel Carey v. Rundle, 409 F.2d 1210, 1214-15 (3rd Cir., 1969) ---------- 20

Chandler v. Fretag, 348 U.S. 3, 9 (1954) ---------- 19

Chase v. Robson, 435 F.2d 1059 (7th Cir., 1970) ---------- 12, 15, 17, 28, 29 et pas.

Clay v. United States, 403 U.S. 698 (1971) ---------- 35

Cohen v. California, 403 U.S. 15, 26 (1971) ---------- 29, 36

Cole v. Arkansas, 333 U.S. 196 (1949) ---------- 33, 36, 37

Page

Cooper v. Hutchinson, 184 F.2d 119 (3rd Cir., 1950) ---------- 20

Craig v. Harney, 331 U.S. 367 (1947) ---------- 30

Eaton v. City of Tulsa, 415 U.S. 697, 698-699 (1974) ---------- 33

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 417 N. 8 (1964) ---------- 49

Faretta v. California, ___ U.S. ___, 43 L.W. 5004 (June 30, 1975) ------ 18

Garner v. Louisiana, 368 U.S. 157 (1961) ---------- 36

Gideon v. Wainwright, 372 U.S. 335 (1963) ---------- 18, 26

Glasser v. United States, 315 U.S. 60 70 (1942) ---------- 18

Gooding v. Wilson, 405 U.S. 518 (1972) ---------- 30

Gregory v. City of Chicago, 394 U.S. 111 (1969) ---------- 36

In re Groban, 352 U.S. 330, 332 (1957) ---------- 18

Hamilton v. Alabama, 368 U.S. 52 (1961)---------- 18

Hensley v. Municipal Court, 411 U.S. 345 (1973) ---------- 49

Page

Hill v. Craven, 464 F.2d 1293 (9th Cir., 1972) ---------- 47

Hill v. Nelson, 466 F.2d 1346, 1348 (9th Cir., 1972) ---------- 47

Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938) ---------- 37

Kruchten v. Eyman, 276 F.Supp. 858, 859 (D.C. Ariz. 1967) ---------- 19

Lanzetta v. New Jersey, 306 U.S. 451 (1939) ---------- 35

Lee v. United States, 235 F.2d 219 (D.C. Cir., 1956) ---------- 19

Lefton v. City of Hattiesburg, Miss. 333 F.2d 280 (5th Cir., 1964) ---- 22

Magee v. Superior Court of City and County of San Francisco, 8 Cal. 3d 949, 954 (Calif. S.Ct. (1973)- 20, 26

Marks v. Smith, 60 S.E. 1016 (Ga. App. 1908) ---------- 39

Moore v. State, 118 Ohio St. 487, 490 (1928) ---------- 38

Murphy v. Florida, ___U.S. ___,L.W. 4730 (June 16, 1975) ---------- 25, 32

Pennekamp v. Florida, 328 U.S. 331 (1946) ---------- 30

People of the State of New York v. Epton, 248 F.Supp. 276, 277 (S.D. N.Y., 1965) ---------- 20

Page

In re Pierce, 189 Wisc. 441, 207 N.W. 966, 970 (S.Ct. Wisc. 1926)--- 20

Powell v. Alabama, 287 U.S. 45, 67 (1932) ---------- 18, 25

Rabe v. Washington, 405 U.S. 313, 315 (1972) ---------- 36

Reiff v. United States, 299 F.2d 366 (9th Cir., 1962) ---------- 19

Reynolds v. Cochran, 365 U.S. 525, 530-31 (1961) ---------- 19

In Re Ruffalo, 390 U.S. 544 (1968)-- 22

Sanders v. Russell, 401 F.2d 241 (5th Cir., 1968) ---------- 22

In Re Sawyer, 360 U.S. 662 (1959)---- 30

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) ---------- 22

Shelton v. Tucker, 364 U.S. 479 (1960) ---------- 30

Sheppard v. Maxwell, 384 U.S. 333 (1966) ---------- 29, 31

Sherbert v. Verner, 374 U.S. 398, 407 (1963) ---------- 30

Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir., 1966), cert. den. 385 U.S. 987 ---------- 20, 27

State v. Agresta, 5 Conn.Cir. 242, 250 A.2d 346 (1968) ---------- 19

	Page
Thomas v. Craven, 473 F.2d 1235 (9th Cir., 1973)	47, 48
Thomas v. Cassidy, 249 F.2d 91 (4th Cir., 1957)	20, 27
Townsend v. Sain, 372 U.S. 293, 312-319 (1963)	46, 49
Tumey v. Ohio, 273 U.S. 510 (1927)	39, 44
United States v. Ash, 413 U.S. 300 (1973)	18
United States v. Bergamo, 154 F.2d 31, 35 (3d Cir., 1946)	20, 27
United States v. Davis, 365 F.2d 251 (6th Cir., 1966)	19
United States v. McMann, 386 F.2d 611 (2d Cir., 1967)	19, 20
United States v. Mitchell, 354 F.2d 767 (2d Cir., 1966)	20, 23
United States v. Sacher, 182 F.2d 416, 430 (2d Cir., 1950)	34
United States v. Seale, 461 F.2d 345, 363 (1972)	34
United States v. Wade, 388 U.S. 218 (1967)	18
United States v. White, 451 F.2d 1225 (6th Cir., 1971)	19

Page

Ward v. Monroeville, 409 U.S. 57 (1972) ---------- 39, 40, 43, 44

White v. Maryland, 373 U.S. 59 (1963) ---------- 18

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) ---- 22

Wood v. Georgia, 370 U.S. 375 (1962) - 30

Constitution, Statutes and Rules

First Amendment ---------- 3,4, 5, 29, 30, et passim

Fifth Amendment ---------- 3,4, 5

Sixth Amendment ---------- 3,4, 5, 18

Fourteenth Amendment ---------- 3,4, 5, 44

28 U.S.C. §1254(1) ---------- 3

28 U.S.C. §2254(d) ---------- 4, 16, 43, 45, 46, et passim

Ohio Revised Code, §2501.02 ---------- 47

Ohio Revised Code, §2901.25 ---------- 5

Ohio Revised Code, §2909.21 ---------- 5

Ohio Revised Code, §2923.43 ---------- 5

Page

Canon 7 of the Code of Professional Responsibility and Disciplinary Rules Dr. 7-107 ---------- 5,15 16, 17, 28 et passim

Other Authorities

Constitutional Rights to Engage An Out of State Attorney, 19 Stan. L. Rev. ---------- 21

The Practice of Law by Out-of-State Attorneys, 20 Vand. L. Rev. 1276 (1967)---------- 21

The Reach of Federal Action Over The Profession of Law, 18 Stan. L. Rev. 1288, 1293 ---------- 19

The Right of Counsel in American Courts, 190 (1955)---------- 19

State Borders Unnecessary Barriers to Effective Law Practice, 53 ABA J. 530 ---------- 21

Note, F. Lee Bailey, Won't You Please Come Home -- The Pro Hac Vice Blues, 1969 Utah L. Rev.856 (1967)-21

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

CHARLES O. ROSS,

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v.

HONORABLE FRANK REDA, Judge,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, Charles O. Ross, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on February 13, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 510 F. 2d 1172 and is printed in the Appendix at p. 11a. The opinion of the United States District Court for the Southern District of Ohio, Eastern Division, is unreported and is printed in the Appendix at p. 14a. The foregoing opinions relate to the petition for a federal writ of habeas corpus.

The underlying conviction in July, 1972 was in the Municipal Court of Columbus, Ohio. That conviction was affirmed by the Franklin County Court of Appeals on March 20, 1973. State v. Ross, 36 Ohio App. 185, 304 N.E. 2d 39, review denied, 46 Ohio Bar 1270 and 1276 (Ohio S. Ct. 1973), appeal dismissed and certiorari denied, 415 U.S. 904 (1974). The Franklin County Court of Appeals opinion is printed in the Appendix at p. 39a.

An earlier unpublished opinion of the Franklin County Court of Common Pleas disqualifying the original trial judge is printed in the Appendix, p. 67a.

JURISDICTION

Petitioner was convicted in the Columbus, Ohio Municipal Court of failure to depart from school property, interference "at an emergency," and simple assault. In addition to fifty dollar fines on each charge, petitioner was sentenced to 30 days in jail for failing to depart. The 30 day sentence, except

for six days already served, has been stayed pending final disposition of this litigation.

Having exhausted State remedies, petitioner unsuccessfully sought a writ of habeas corpus in the United States District Court for the Southern District of Ohio, Eastern Division. On appeal to the Sixth Circuit, the denial of relief was affirmed. No petition for rehearing was filed.

On May 6, 1975, Mr. Justice Stewart, as Circuit Justice, granted an extension of time within which to file a petition for a writ of certiorari, up to and including July 12, 1975.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a State court's use of its powers with respect to pro hac vice admission of attorneys to deny to an accused the services of his retained chief counsel, an attorney in good standing with whom he had prior and successful relationship, premised on the State's desire to punish counsel for his outspoken views upon a contraverted constitutional question and wholly unrelated to anything counsel had done in this case, violates the Due Process and Right to Counsel clauses of the Fifth and Sixth Amendments as incorporated in the Fourteenth Amendment?

2. Whether under the First, Fifth and Sixth Amendments as incorporated in the Fourteenth Amendment, in the absence of a finding of specific necessity showing that the administration of justice or a fair trial is threatened in a particular case, a State may, by blanket rule applicable to all cases, prohibit attorneys of record from making public comment about a case in litigation and may enforce that prohibition by preventing a defendant in a criminal case from having retained counsel of his choice because of speculative future violations of the rule?

3. Whether affirmance on appeal of a State criminal conviction on a novel theory and factual determination unrelated to the trial court's rationale for its critical ruling violates the Fourteenth Amendment's Due Process clause, especially where the defense strategy at trial was premised upon the stated rationale for trial court's ruling?

4. Whether the Due Process clause of the Fourteenth Amendment requires that a trial judge, upon replacing another who was removed for prejudice, make a genuine de novo determination of each in a series of rulings by the predecessor judge, many of which were upon issues which entailed exercises of judicial discretion, and which were made after the affidavit of prejudice was filed?

5. Whether 28 U.S.C. §2254(d) precludes a federal habeas court from independently determining the legal significance of "facts" which were first found by a State appellate court that

lacked fact-finding authority and which are plainly not supported by the record?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1) The First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States are printed in the Appendix at p. 1a.

2) 28 U.S.C §2254(d) is printed in the Appendix at p. 3a.

3) Ohio Revised Code, §2909.21; 2901.25; 2923.43 are printed in the Appendix at p. 5a.

4) Canon 7 (EC 7-33) of the Code of Professional Responsibility and Disciplinary Rule DR 7-107 B, C, and D, adopted by the Supreme Court of Ohio are printed in the Appendix at p. 7a.

STATEMENT OF THE CASE

Professor Charles O. Ross, a tenured faculty member at Ohio State University in Columbus, Ohio was arrested on May 25, 1971, when he attempted to engage a police official in conversation during community observation of the reopening of a municipal high school. 1/

1/ The Spring of 1971 was a time of racial unrest throughout the nation. In Columbus, black high school and college students held marches and rallies, and

footnote continued on next page.

The arrest was the culmination of a substantial history of charges and countercharges between Professor Ross and Columbus municipal leaders as to racial

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1/ continued from previous page.

otherwise engaged in protected political activities.

Linden McKinley High School had a largely black student body. Racial conflicts had occurred at the school, which thereafter closed for a period of days. It was to reopen on the morning of May 25, 1971. Because of anxiety that a disturbance might occur, school officials had invited black clergy to come to the school both as observers and to help maintain order. In addition to the clergymen, many other concerned black citizens came to the school's auditorium and peacefully assembled. Professor Ross was among them. At an early hour, some fighting among students was observed in the school halls. Police were called in.

Thereafter, then City Safety Director James Hughes -- since elected City Attorney, and, in that capacity, counsel for respondent -- came to the school and urged that it be closed. At Hughes' suggestion, an instruction to the observers and students in the auditorium that they leave the school or return to their classrooms, was issued by the principal. The incidents underlying this case followed the principal's allegedly telling all outsiders to leave the school's auditorium.

issues. 2/ Professor Ross was charged with failing to depart the premises, interfering with police at the scene of an emergency, and assault by threatening a police employee who had just punched petitioner to the ground in the fingerprint room.

Petitioner made arrangements to be represented by an out-of-state attorney, Mr. William Kunstler, in proceedings growing out of the May 25th events. The first such proceeding in which Mr. Kunstler participated was an administrative hearing at the University to determine whether petitioner should be suspended from the faculty during the pendency of criminal proceedings. Mr. Kunstler's representation was without untoward incident and petitioner pre-

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2/ Petitioner joined the University faculty as its first Director of the Black Studies Division in the College of Humanities. He entered this position after an extensive search by a coalition of students, faculty members, and unaffiliated citizens, with a mandate to establish Black Studies as an integral part of the curriculum. Petitioner's acceptance as Director by the University's Board of Trustees was controversial. A continuous campaign to force him from his position was waged by one local newspaper. A number of municipal and University officials regularly fueled that newspaper's inflammatory reportage.

vailed. 3/

Thereafter, under Mr. Kunstler's supervision, numerous pretrial motions were filed in the municipal court by local counsel. Some motions raised basic constitutional issues, including inter alia systematic exclusion of blacks from jury rolls. One of the motions was for Mr. Kunstler's admission pro hac vice.

At a pretrial hearing in March, 1972, Chief Municipal Judge Fais announced the "very real possibility" he would exclude Mr. Kunstler from participating, stating that the matter was purely discretionary, and that he was not required to give a reason. Judge Fais thereupon denied the motion for pro hac vice admission, obstensibly because it was not signed by Mr. Kunstler, but granted leave to refile the motion if personally signed by Mr. Kunstler. This was promptly done.

On April 3, 1972, Mr. Kunstler was formerly introduced to the court by local counsel, and presented his credentials. Judge Fais showed open hostility toward the defense, highlighted by an extended and gratuitous denunciation of Mr. R. Raymond Twohig, Jr., petitioner's local counsel, charging him with misappropriating funds from the Ohio State University School of Law to assist in the defense

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3/ Mr. Kunstler was also associated as counsel, in a federal civil rights suit brought by Professor Ross against the University.

of Professor Ross. 4/ In addition to his unfounded charges made against Mr. Twohig in court, Judge Fais, while addressing a church group, denounced Mr. Kunstler and F. Lee Bailey. He also granted interviews to the local press, at which, while still sitting as the judge on the Ross case, he discussed the case.

In the wake of these developments, petitioner, on the morning of April 6, 1972, filed and served an affidavit of prejudice and motion to disqualify Judge Fais. Later that day, and during the next five days, Judge Fais filed written opinions summarily denying each pending pretrial motion, including the motion for pro hac vice representation by Mr. Kunstler.

In denying petitioner representation by Mr. Kunstler, Judge Fais retreated from his prior claim of unfettered discretion. His opinion, purporting to offer justification for his ruling, declared that "the applicant's [past] conduct was unprofessional," and hence Mr.

4/ Judge Fais had previously insisted on venting this same baseless allegation in open court during a totally unrelated trial at which Mr. Twohig (a professor of law) was supervising a student's appearance as defense counsel. On that occasion, Judge Fais demanded answers from Mr. Twohig, under threat of contempt, as to the terms of his contract with the University.

Kunstler "has not qualified himself to be admitted pro hac vice in this case." But, as the United States District Court later noted, "The Court of Appeals for Franklin County, Ohio held that Mr. Kunstler's [alleged past conduct was] not sufficient grounds to exclude him, because there was no evidence of record that Mr. Kunstler had, in fact, engaged in any alleged unprofessional conduct." See opinion of District Court, 27a; opinion of Court of Appeals for Franklin County, 39a.

On the afternoon of Thursday, July 6, 1972, the Franklin County Court of Common Pleas, responding to the motion to disqualify, ordered that Judge Fais not hear the case and a substitute Judge should be assigned by lot. 5/ Judge Reda, respondent herein, was so selected.

Later that afternoon, Judge Reda denied a defense motion for continuance and adjourned until the following morning. At that time,(Friday, July 7) he announced that the night before he had reviewed Judge Fais rulings and would "disturb" none of them. As the whole

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5/ The Sixth Circuit erroneously declared that Judge Fais "disqualified himself." To the contrary, he persisted in issuing rulings after being served with the affidavit of prejudice. His participation in trial proceedings ended only when he was ordered off the case by the Court of Common Pleas..

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record demonstrates, Judge Reda made no supplemental findings. He refused petitioner's repeated request that he review Judge Fais' rulings de novo. He claimed that Judge Fais made no error of substantive law, and despite Judge Fais' removal and the reasons therefore, he considered it highly improper to substitute his own judgment for Judge Fais' as to discretionary matters. He again denied a continuance and fixed the date of the trial as July 10, the following Monday.

On the morning of trial, petitioner again requested reconsideration of the exclusion of Mr. Kunstler as chief counsel. Judge Reda allowed the "indulgence" of permitting petitioner to "clarify . . . the record." Mr. Twohig thereupon reminded the successor judge that the Court of Common Pleas, in ordering Judge Fais off the case, had stated that Judge Fais' "rulings on[the defense] motions might be construed as bias on his part against either the defendant or his attorneys." (emphasis supplied). Additionally, Mr. Twohig pointed out,as the reviewing courts subsequently held, that there was no evidence of record to support the factual findings upon which Judge Fais had excluded Mr. Kunstler from the trial. Judge Reda did not respond to these assertions.

Thereafter, Mr. Kunstler was permitted to address the court. In the course of the ensuing colloquy, Judge Reda said,

> * * * I am concerned about your conduct outside the courtroom * * * I had reports of your conduct [the source and substance of which are not in the record] * * * Now, do you have any statements that you would like to make to the Court with respect to what you believe an attorney's conduct should be outside of the courtroom?

Mr. Kunstler replied:

> Outside of the courtroom I have every right to all the First Amendment privileges of any other person * * * [U]nless you show by an evidentiary hearing that there is a clear and present danger to the administration of justice, no court can bind a lawyer or his client * * * from making extra-judicial statements.

Mr. Kunstler cited Chase v. Robson, 435 F. 2d 1059 (7th Cir. 1970), and pressed that decision as being the law of the land.

Judge Reda, at the conclusion of this colloquy, refused to "change [the Court's] opinion in this matter." He offered no reason, merely stating that "there is nothing new that has been presented to the Court." Thereafter, Professor Ross reiterated his belief that the trial was a political persecution, not a bona fide prosecution. He therefore felt he required the specialized services of Mr. Kunstler. For the expressed purpose of preserving this issue, petitioner dismissed local counsel and announced he would stand mute through the trial.

That afternoon, a jury was selected. The following morning the jury heard the State's uncontested evidence. Petitioner stood mute throughout. 6/ After four hours of deliberation, the jury returned a guilty verdict on all charges. The instant petition attacks the underlying conviction and the unserved portion of a 30-day sentence to the workhouse. 7/

On direct appeal, petitioner urged inter alia that Judge Reda had a duty to rule de novo on all issues. He further argued that there was no factual substantiation for Judge Fais' findings as to Mr. Kunstler's alleged improper conduct

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6/ The Sixth Circuit misleadingly states that petitioner "present[ed] his own case." To the contrary, petitioner offered no evidence, refused to examine adverse witnesses, and made no argument. Whenever addressed by Judge Reda, he repeated his assertion that he would not and could not represent himself.

7/ Petitioner's order to report for confinement ripened just after notice of appeal to the Sixth Circuit was filed. When petitioner reported, he was accompanied by Mr. Twohig's clerk. The clerk attempted to serve Judge Reda and police officers with notice that appeal was pending, together with a copy of Federal Rules of Appellate Procedure 23(a), which prohibits transfer of custody absent permission of the federal court. Judge Reda refused to accept personal service and ordered that petitioner be confined. Six days later the Sixth Circuit ordered petitioner's release pending final disposition of the case.

and since Judge Reda made no factual finding of his own, he either adopted Judge Fais' findings or if not, was arrogating to himself unfettered discretion to deny an application for pro hac vice admission. 8/

The Franklin County Court of Appeals rejected the assigned error that all of Judge Reda's rulings were tainted by reason of bias of Judge Fais on the alternative grounds that Judge Reda had ruled independently and that the brief failed to preserve error in any particular tainted ruling, except for two rulings discussed in separate assignments of error.

One of the "preserved" rulings was the exclusion of Mr. Kunstler. The State appellate court admitted that there was no support in the record for the findings upon which Judge Fais based his ruling. The Court could point to no finding by Judge Reda which invoked a rationale different from that erroneously offered by Judge Fais. Nonetheless, the ruling excluding Mr. Kunstler was affirmed by the appellate court's substituting its own

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8/ During the trial on the merits, Judge Reda reverted to the view originally held by Judge Fais, declaring that "the Court has the discretion in these matters on non-resident attorneys, and the Court exercised its discretion unfavorably to Mr. Kunstler." In reality, the Court's action was unfavorable to petitioner. Petitioner's rights -- not Mr. Kunstler's -- were in issue.

rationale for that of the trial court. Alluding to the colloquy between Judge Reda and Mr. Kunstler described above, the Franklin County Court of Appeals held that Canon 7 of the Code of Professional Responsibility as adopted by Ohio's Supreme Court is the controlling rule in State courts despite the holding of Chase v. Robson, supra, and that the trial court "was justified in concluding" that Mr. Kunstler "would not [in futuro] comply with the standards established by Canon 7" (p. 32 a), and accordingly, pro hac vice admission was properly denied.

In fact, Judge Reda had made no such conclusion; indeed he never even mentioned Canon 7. Moreover Judge Reda never suggested that the rule of Chase is either incorrect or inapplicable to the Ross case. To the contrary, Judge Reda had dismissed Mr. Kunstler's opinion as inconsequential, "nothing new." And at no time did Judge Reda advise Mr. Kunstler that he rejected Chase and would insist on compliance with Canon 7 by any attorney admitted pro hac vice. 9/

9/ The source of the appellate court's statement that the trial court "was justified in concluding"that Mr. Kunstler "would not comply with the standards established by Canon 7"is nowhere stated. Mr. Kunstler did state in the course of the colloquy, "I would never promise Your Honor that I would not speak outside" but it is clear from the context that Mr. Kunstler was referring at that time to the rule of Chase v. Robson and the requirement that there be a specific finding and a direc-

footnote continued on next page.

On habeas corpus, the United States District Court recognized that the rationale of the Franklin County Court of Appeals was created post hoc. It found that the record as to Mr. Kunstler's alleged intention "not [to] comply" in futuro with Canon 7 "is susceptible of a contrary interpretation." (34a) 10/ But the District Court held itself without power to pierce through the State appellate court's fact-finding legerdemain, citing 28 U.S.C. §2254(d).

9/ footnote continued from previous page.

tion by the Court in order to sustain a gag rule upon attorneys. Indeed, Mr. Kunstler in the course of his colloquy, and after mentioning the procedures of Chase, said that if the court made certain findings "then I would submit Your Honor would have a right to take this very action [prohibiting extra judicial statements] if that happens."

For reasons not stated, both the Ohio appellate court and the District Court omitted the foregoing from their quotation of Mr. Kunstler's statement. This portion of Mr. Kunstler's statement appears a short space beyond that quoted by both courts.

10/ This is an unusually deferential way of stating that there was in fact no mention of Canon 7 during the entire colloquy, nor was there any statement by Mr. Kunstler of an intention to violate the Canon.

Some explanation for this formulation by the Court may be found in the District Court's plainly erroneous statement that Mr. Kunstler had said "that the Court did not have power to prohibit him from speaking outside the courtroom." Mr. Kunstler stated exactly the contrary as pointed out in fn.9.(28a)

The Sixth Circuit affirmed in a short per curiam, expressing the view that the State could deny a pro hac vice admission because of a "potential violation of Canon 7 of the Ohio Canons of Ethics" (emphasis added)(p. 13a). The Sixth Circuit did not address the fact that the trial court never premised its actions on the findings of the State appellate court, nor did it deal with the fact that the Municipal Court never so much as mentioned Canon 7 and that it expected compliance therewith without the procedure and limitations prescribed by Chase v. Robson. As to whether Judge Reda was required to make an "independent investigation" of the issues, it simply stated that it was satisfied that the substituted judge "reviewed" the prior rulings and determined them to be correct.

REASONS FOR GRANTING THE WRIT

I

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT CONSTITUTIONAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT AS TO WHICH THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS -- NAMELY THE SCOPE OF A COURT'S POWER TO REFUSE PRO HAC VICE ADMISSION TO OUT-OF-STATE COUNSEL IN GOOD STANDING WHERE THE EFFECT ON SUCH REFUSAL IS TO DENY TO AN ACCUSED IN A CRIMINAL TRIAL THE RIGHT TO RETAINED DEFENSE COUNSEL OF HIS CHOICE.

The Sixth Amendment right to counsel is one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," Powell v. Alabama, 287 U.S. 45, 67 (1932); Hamilton v. Alabama, 368 U.S. 52 (1961); Gideon v. Wainwright, 372 U.S. 335 (1963); White v. Maryland, 373 U.S. 59 (1963); United States v. Wade, 388 U.S. 218 (1967); Argersinger v. Hamlin, 407 U.S. 25 (1972); United States v. Ash, 413 U.S. 300 (1973); Faretta v. California, ___U.S.___, 43 L.W. 5004 (June 30,1975).

"It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice," Powell, supra, 287 U.S. at 53 (emphasis added). Accord, Glasser v. United States, 315 U.S. 60, 70 (1942); In re Groban, 352 U.S. 330, 332 (1957).

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In Chandler v. Fretag, 348 U.S. 3, 9 (1954), this Court stated firmly that a defendant's right "to be heard through his own counsel was unqualified." See also Reynolds v. Cochran, 365 U.S. 525, 530-31 (1961). See generally, W. Beaney, The Right to Counsel in American Courts, 190 (1955); cf. Cheatham, The Reach of Federal Action Over the Profession of Law, 18 Stan. L. Rev. 1288, 1293. State v. Agresta,5 Conn.Cir.242,250 A.2d 345 (1968)11/

11/ There are a few recognized limitations. A defendant seeking to have court appointed counsel does not have a right to dictate the appointment. United States v. White, 451 F. 2d 1225 (6th Cir. 197-); Reiff v. United States, 299 F. 2d 366 (9th Cir. 1962); cert. den. 372 U.S. 937 (1963); Kruchten v. Eyman, 276 F. Supp. 858, 859 (D.C. Ariz. 1967), aff'd 406 F. 2d 304 (9th Cir. 1969), mod. on other grounds, 408 U.S. 934 (1972); United States v. Davis, 365 F. 2d 251 (6th Cir. 1966). But even here it has become the growing practice of courts to appoint counsel requested by an indigent defendant if counsel is willing.

Also, where the defendant seeks to change his choice of counsel immediately before a trial, or delays choosing counsel until immediately prior to trial, a court need not permit such delays to interfere with the smooth working of its calendar. United States v. McMann, 386 F. 2d 611 (2nd Cir. 1967); Lee v. United States, 235 F. 2d 219 (D.C. Cir. 1956); Faretta v. California, supra. But even in those situations, the court will be

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On the matter of pro hac vice admission -- where such a course is sought so that a defendant may have counsel of his own choice -- there appears to be confusion in the courts. In the federal judicial system, admission pro hac vice of counsel from another jurisdiction has been stated to be a matter of absolute constitutional right. United States v. Bergamo, 154 F. 2d 31, 35 (3rd Cir. 1946), even in civil litigation, Spanos v. Skouras Theatres Corp. 364 F. 2d 161 (2nd Cir. 1966), cert. den. 385 U.S. 987.

In the State judicial systems there are occasional references suggesting that inter-state pro hac admission is a matter of "grace" (as suggested by Judge Fais in this case). Cooper v. Hutchinson, 184 F. 2d 119, 192 (3rd Cir. 1950); In re Pierce, 189 Wisc. 441, 207 N.W. 966, 970 (S. Ct. Wisc. 1926); Thomas v. Cassidy, 249 F. 2d 91 (4th Cir. 1957), cert.den. 355 U.S. 958 (1958); People of the State of New York v. Epton, 248 F. Supp. 276, 277 (S.D.N.Y. 1965). Other courts state that such an admission may not be arbitrarily denied. See Cooper v. Hutchinson, supra at 122 and the District Court's opinion in this case (34a) citing Magee v. Superior Court, 8 Cal. 3d 949, 954

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very slow to override defendant's efforts to obtain counsel of his own choice. United States v. McMann, supra at 618-19; United States ex rel. Carey v. Rundle, 409 F. 2d 1210, 1214-15 (3rd Cir. 1969). Especially is this so in an "unpopular" case having "First Amendment overtones," United States v. Mitchell, 354F.2d 767 (2nd Cir. 1966).

(Calif. S. Ct. 1973) and Banks v. Holder, printed at 71 a. (7th Cir. 1973)(unpub.)

The Sixth Circuit's opinion in this case exemplifies the confusion on the issue. The Circuit quotes from Cassidy, supra to the effect that pro hac vice admission is "not a right but a privilege . . . which is a matter of grace resting in the sound discretion of the judge." Three paragraphs later the Sixth Circuit says, "the prerogative of a trial judge to exclude out-of-state counsel. . . is not an absolute right." (510 F. 2d 1172,1173, p. 12a.)

We submit that limitation upon a state criminal defendant's choice of counsel can only be constitutionally justified by demonstrating that the state has a valid and compelling reason for interfering with this most fundamental of rights. Where the limitation takes the form of denying pro hac vice representation by an attorney in good standing with his home bar, that denial must be predicated upon a procedurally proper and substantively necessary exercise of the State's police powers, in furtherance of a legitimate and commanding interest of the State. See generally, Morris, State Borders Unnecessary Barriers to Effective Law Practice, 53 ABA J. 530. Note, F. Lee Bailey, Won't You Come Home--The Pro Hac Vice Blues, 1969 Utah L. Rev. 227, Constitutional Right to Engage an Out-of-State Attorney, 19 Stan. L. Rev. 856 (1967); The Practice of Law by Out-of-State Attorneys, 20 Vand. L.Rev. 1276 (1967).

The interests which the State seeks to protect in granting or denying pro hac vice appearance by out-of-state coun-

sel are no different from those which are properly protected through permanent certification and disciplinary procedures of in-state attorneys, both of which are governed by procedural and substantive due process requirements. Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); In re Ruffalo, 390 U.S. 544 (1968). These interests are the protection of the public from incompetent or unscrupulous practioners. 12/ Because an out-of-state attorney has not demonstrated his familiarity with the law of the forum, he may be required to associate himself with an in-state attorney. But even this requirement cannot be enforced if the local bar is unwilling or unable to act as local counsel. See Lefton v. City of Hattiesburg, Miss., 333 F. 2d 280 (5th Cir. 1964). See also Sanders v. Russell, 401 F. 2d 241 (5th Cir. 1968). Additionally, a state might reasonably deny pro hac vice admission to an attorney whose

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12/ The State's arguable interest in protecting the economic welfare of the practitioner is, of course, met by the requirement of the concurrant appearance of local counsel, or making certain that the pro hac vice denial is not overused by a particular lawyer so that he is in effect holding himself out to the State's population as a fully admitted attorney. See Brown v. Woods, ___Ark. ___, 516 S.W. 2d 98 (1974, dissent), cert. den. 95 S. Ct. 1951 (1975). In any event, economic considerations are wholly unrelated to the issues in this case.

home state applied so dramatically attenuated a standard of general competency and honesty as to suggest that the attorney could not have gained permanent admission in the forum states. Finally, a state may reasonably require proof that an out-of-state attorney is currently in good standing with his home bar.

When the State imposes greater limitations on pro hac vice appearances, it is not merely acting arbitrarily and capriciously; it impairs the right to counsel. Today, the most capable practitioners specialize in relatively narrow, and even esoteric, areas of the law, and the itinerant attorney has become all but commonplace in every state's courtrooms. Every state routinely gives full faith and credit to a sister state's ascertainment of professional competency and character, for purposes of permitting an appearance pro hac vice in association with local counsel. Ohio makes no claim that its courts regularly act differently from the traditions prevailing in the 49 sister states. Its claim in this case, at bottom, is a non-existent right to exclude a criminal defendant's personally retained attorney from the state's courtrooms, not for his acts of commissions or omission, but for his reputation as an outspoken attorney who specializes in precisely the type of case where local counsel are frequently ineffective. For in a case with "First Amendment overtones, it is always difficult to obtain counsel to defend an unpopular cause . . ." United States v. Michell, supra.

The State's interest in having the power to discipline a licensed attorney who thereafter falls below the minimally accepted standards is fully protected by a pro hac vice admission. Firstly, by the process of pro hac vice admission he subjects himself to the disciplinary process of the forum. Moreover, every state is willing and able to process disciplinary grievances entered against its fully licensed attorneys, whether the grievance arose in-state or out-of-state. An attorney's professional responsibilities do not end at his home state's borders.

The rulings below plainly visit upon an unpopular accused the uncommitted sins of his chosen trial counsel. 13/ In excluding Mr. Kunstler from participation in the trial, the state impaired the accused's constitutional right to counsel of his choice in the total absence of good, let alone compelling, cause. The victim was not counsel, but the client!

13/ It is not for the courts to second-guess an accused as to his need for the services of a given attorney. Particularly is this so where there has been an established lawyer-client relationship, as is here the case. Mr. Kunstler had appeared in two prior proceedings on behalf of Professor Ross, both related to the events underlying the instant case. Although the State appellate court and the Sixth Circuit make much of Professor Ross's refusal to accept the continued services of his retained local counsel, they fail to appreciate that acceptance of their unspecialized services at trial

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In Powell v. Alabama, supra this Court stated:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel employed and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and, therefore, of due process in the constitutional sense.

This petition presents the Court with such a case.

Recently the Seventh Circuit dealt directly with the conflict between the defendant's claim to counsel of his choice and the asserted right of a local judge to deny pro hac vice admissions. In Banks v. Holder, Oct. 1, 1973, (unreported, but printed in Appendix hereto at p. 72a) that Court concluded:

> "before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent

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would undoubtedly have been construed as a waiver of petitioner's claim to the services of Mr. Kunstler, or, alternatively, would have invited a finding of harmless error. Cf. Murphy v. Florida, ___U.S.___, 43 L.W. 4730 (June 16, 1975).

threat of 'significant prejudice to the defendant himself' or of 'disruption of the orderly process of justice unreasonable under the circumstance of the particular case.' Magee v. Superior Court of City and County of San Francisco, 8 Cal. 2nd 949, 506 P. 2d 1023 (1973)."

This Court accepted a petition for writ of certiorari to review the foregoing decision. But after briefs were submitted and oral argument was had, the petition was dismissed as having been improvidently granted. 417 U.S. 187(1974).

The standards employed by the Sixth Circuit in this case are plainly in conflict with those of the Seventh Circuit in Banks. 14/

The question is whether a court considering a request for pro hac vice admission must grant the same unless there be "sufficiently supported and specific findings of fact . . .[of] a serious and imminent threat of'significant prejudice to the defendant himself' or of 'disruption of the orderly process of justice. . .'" (Banks, supra at p.72 a.) as specified by the Seventh Circuit or whether as indicated by the Sixth Circuit in this case, almost any statement,how-

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14/ We recognize, of course, that Banks arose in the context of the federal judicial system and the instant case arises out of the state judicial system, but the right to counsel is one which has the same constitutional value in both judicial systems. Gideon v. Wainwright, 372 U.S. 335 (1963).

ever unsupported by the record will sustain a denial of a pro hac vice admission on the theory that, though a trial judge may not have "an absolute right" to exclude out-of-state counsel, the entire matter is one of "grace resting in the sound discretion of the judge."

The case is presented to the Court in the posture of a clear conflict between at least the Sixth and the Seventh Circuits as to the constitutional standards for pro hac vice admission. It would also appear that the Second and Third Circuits have a view in accord with the Seventh (Spanos v. Skouras Theatres Corp., supra; United States v. Bergamo, supra, but the Fourth Circuit seems to go in the direction of the Sixth (Thomas v. Cassidy, supra. In the face of this conflict, guidance by this Court is a compelling necessity in an area where there is a grave threat to a major constitutional right -- the right to counsel.

II

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT CONSTITUTIONAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT AS TO WHICH THERE IS CLEAR CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS -- NAMELY, THE SCOPE OF A COURT'S POWER TO LIMIT EXTRA JUDICIAL COMMENT BY AN ATTORNEY BY A GENERAL RULE WITHOUT A FINDING OF NECESSITY IN A PARTICULAR CASE AND WITHOUT A SHOWING THAT THE ADMINISTRATION OF JUSTICE OR A FAIR TRIAL IS THREATENED.

There is nothing in the record of this case -- and the Ohio appellate court so stated -- to show that Mr. Kunstler had made improper extra-judicial statements. The exclusion of Mr. Kunstler was sustained by the Ohio appellate court and in turn by the Sixth Circuit, exclusively on the grounds that he stated that in his view, Chase v. Robson, supra was the governing law, coupled with the conclusion of the Ohio appellate court that the trial court could have concluded that Mr. Kunstler would not comply with Canon 7 or the Ohio Code of Professional Responsibility.15/

While the Sixth Circuit does not mention or cite Chase v. Robson, supra, its decision implicitly accepts the validity of Canon 7 of the Code of Professional Responsibility which even the

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15/ We repeat that the trial court made no such conclusion and at no time indicated to Mr. Kunstler that it expected compliance with Canon 7, regardless of Chase v. Robson, supra.

Ohio appellate court recognized to be inconsistent with "the guidelines of Chase." (51a.) Thus there is a conflict between the Sixth and Seventh Circuits upon an issue which has developed throughout the federal and state judicial systems and as to which there is no guidance from this Court.

Building on dictum in Sheppard v. Maxwell, 384 U.S. 333 (1966), courts throughout the nation have adopted rules governing extra-judicial statements by attorneys. These rules followed reports of the Reardon Committee of the American Bar Association 16/ and the Kaufman Committee 17/. But except for the decision by the Seventh Circuit in Chase, there has been no articulated analysis of the serious First Amendment questions which these restrictions involve, such as:

a) Does a blanket rule prohibiting all extra judicial statements in pending cases violate the requirement that no First Amendment limitation may be imposed without a compelling reason, Cohen v. California, 403 U.S. 15, 26 (1971). When such a

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16/ Standards relating to Fair Trial and Free Press.

17/ Report of the Committee of the Operation of the Jury System on the Free Press - Fair Trial Issue, 45 F.R.D. 391.

restriction is imposed it must not be "overbroad", Gooding v. Wilson, 405 U.S. 518 (1972), and it must be demonstrated "that no alternative forms of regulation would combat [the danger] without infringing First Amendment rights." Sherbert v. Verner, 374 U.S. 398, 407 (1963); Shelton v. Tucker, 364 U.S. 479 (1960)?

b) Do not the foregoing principles prohibit application of a rule prescribing a lawyer's extra-judicial statements until there has been a finding in the particular case that such a proscription is necessary and justified upon some acceptable constitutional standard which defines a serious and imminent threat to the administration of justice? This is the standard employed by the court as to non-lawyers, Bridges v. California, 314 U.S. 252 (1941); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Wood v. Georgia, 370 U.S. 375 (1962). Does the status of being a lawyer remove one from the penumbra of these constitutional limitations despite this Court's ruling in In Re Sawyer, 360 U.S. 662 (1959) emphasizing that the only basis for restricting lawyers' speech was a showing of actual obstruction of the administration of justice?

c) Given a court's power upon a showing of necessity to fashion a "gag" order to curb statements which might prejudice a trial in a particular case, is not such a procedure (with attendant due process) the only way to avoid overbroad and unnecessary restrictions on speech? The Kaufman Committee expressly noted this alternate procedure. See 45 F.R.D. 409.

These are the questions addressed by the Seventh Circuit in Chase, but completely ignored yet sub silentio rejected by the Sixth Circuit in this case.

Since there now exists a clear conflict between the Sixth and Seventh Circuits upon the implementation of this Court's dictum in Sheppard v. Maxwell, supra, it is appropriate that the Court grant this petition and give appropriate guidelines to lower courts.

III.

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW DECIDED BY THE CIRCUIT COURT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT -- NAMELY WHETHER A CONVICTION MAY BE SUSTAINED BY AN APPELLATE COURT UPON GROUNDS DIFFERENT FROM THOSE STATED BY THE TRIAL COURT WHERE THE DEFENDANT'S TRIAL STRATEGY WAS GOVERNED BY THE ACTIONS OF THE TRIAL COURT.

Petitioner was denied pro hac vice representation by his chosen counsel, Mr. Kunstler, upon a finding by Judge Fais that counsel had engaged in prior misconduct. The successor trial judge adhered to Judge Fais' ruling without making further findings, in the face of local counsel's demonstration that the record would not support a finding of past misconduct. The only state appellate court to consider the merits specifically held that the record would not support a finding of prior

misconduct. 18/

The appellate court affirmed petitioner's conviction by independently searching the record for an alternative basis upon which chosen counsel could - might theoretically - have been excluded. It purported to find such a basis by seizing upon Mr. Kunstler's stated opinion that the rule of Chase v. Robson properly declared the limitations which the First Amendment imposes upon judicial control of an attorney's out-of-court statements. The trial court considered Mr. Kunstler's stated opinion to be irrelevant to the merits of his pro hac vice representation of petitioner; it was "nothing new." But the state appellate court deemed it dispositive.

To do so, the Franklin County Court of Appeals first held that Chase applies only to the federal judicial system and could not reach state courts. It next held that the controlling Ohio rule stated a more restrictive standard than that announced in Chase, but was not repugnant to the Constitution. Finally, it held that Mr. Kunstler's professional opinion demonstrated that he would subsequently violate the Ohio rule, and therefore, he was ineligible to appear pro hac vice in an Ohio court.

18/ The state appellate court recognized that every aspect of trial on the merits was substantially altered by Mr. Kunstler's exclusion. Petitioner had to stand mute as the only certain means of preserving his claim that the ruling excluding participation by his chosen chief counsel was erroneous. Cf. Murphy v. Florida, supra.

To obviate the impact of Cole v. Arkansas, 333 U.S. 196 (1949), on its post hoc invention of a supposedly adequate basis in the record for denying petitioner the specialized services of his chosen chief counsel, the state appellate court, without any foundation whatever, attributed its own findings to the trial judge.19/ The district court acknowledged this and specifically found that "the Court of Appeals for Franklin County, Ohio, based its decision upon two grounds not expressly stated by either Judge Fais or Judge Reda." But the district court failed to appreciate the due process implications of this finding, and the Sixth Circuit failed to address them.

In Cole v. Arkansas, supra, this Court held it "a violation of due process for the appellate court to appraise and affirm petitioners' convictions on considerations other than those governing the case as it was tried and as the issues were determined in the trial court." 333 U.S. at 347, n. 1 (emphasis added).

19/ The opinion states: "From Mr. Kunstler's statement, the trial court was justified in concluding that Mr. Kunstler would not comply with the standards established by Canon 7 . . ." (51 a) (emphasis supplied). Assuming without conceding that the trial court might have been justified in so concluding, the trial record is unambiguous; no such conclusion was made. Cf. Eaton v. City of Tulsa, 415 U.S. 697, 698-699 (1974).

The denial of due process in this case is obvious. When petitioner decided to stand mute he had a right to rely upon what he heard the court say: namely that his chosen lawyer would be excluded because he had misconducted himself. Knowing that the court was wrong, petitioner stood mute, confident that he would be sustained in his position. 20/ Indeed, he was sustained; the appellate court confirmed that there was no record of his lawyer having misconducted himself.

The appellate court in fashioning a new theory effectively denied petitioner due process, because had he timely knowledge of the new theory both he and his lawyer might have acted quite differently.

a) If Mr. Kunstler had been told that his statement was being interpreted as an

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20/ Emphasizing that defendants may not react to bad rulings except by abiding with them and appealing, the Seventh Circuit in United States v. Seale, 461 F.2d 345, 363 (1972) said:

> it is precisely because appellate courts sit to vindicate error that this principle is viable.

Similarly, Judge Augustus Hand, speaking for the court in United States v. Sacher, 182 F.2d 416, 430 (2d Cir., 1950), aff'd. 343 U.S. 1 (1952) said re aggrieved defendants, "their only remedy is by appeal." If an appellate court can switch theory in order to affirm a decision, then the protection which the appellate process should afford is vitiated.

assertion that he would violate Canon 7, and that the trial court rejected Chase v. Robson, Mr. Kunstler might have made clear that he would abide by Canon 7;

b) More critically, if petitioner had been told that he could not have the lawyer of his choice for the reason that his lawyer would not accept Canon 7, he might have sought to persuade Mr. Kunstler to alter his position, and if unsuccessful he might not have stood mute.

Time and time again, in a multitude of contexts, this Court has refused to countenance an appellate tribunal's imposition of its own views as to the salient issues and evidence, or of the proper exercise of discretion, where the court or agency of original jurisdiction premised its action on an erroneous view of the law.

In Clay v. United States, 403 U.S. 698 (1971) (per curiam), this Court held that a Selective Service registrant could not be criminally punished for relying on his belief that the critical administrative determination was erroneous, notwithstanding the Solicitor General's insistence that the appeal board might have acted on legally adequate grounds. It not being clear that the board relied on some legitimate ground, a reviewing court could neither second-guess the appeal board nor would it second-guess the registrant, who had acted in reliance upon the perceived impropriety of the appeal board's determination. Here, the state appellate court second-guessed the trial court petitioner, and petitioner's attorney. See also Lanzetta v. New Jersey, 306 U.S. 451 (1939);

Brinkerhoff-Faris T. and S. Co. v. Hill, 281 U.S. 673 (1930); Rabe v. Washington, 405 U.S. 313, 315 (1972).

Most recently, in Eaton v. City of Tulsa, supra, this Court per curiam held that "the question is not upon what evidence the trial judge could find petitioner guilty but upon what evidence the trial judge did find petitioner guilty." 415 U.S. at 698 (emphasis in original). Although Eaton was concerned with the premises upon which petitioner was convicted of contempt of court, and the instant case is concerned with the premises upon which petitioner was denied the assistance of his chosen counsel, the distinction reflects no underlying difference. In both cases, a state appellate court sustained a conviction by construing a record in a manner at variance with the theory upon which the critical issue initially was examined and decided. In both cases, the critical issue was dispositive of all other issues.

Here, as in Eaton, the trial court "at least owe[d] the party concerned some sort of notice or warning." 415 U.S. at 701, Powell, J., concurring. In Eaton, such notice would have related to whether petitioner should stand mute. In both cases, as in Cole, supra, the state appellate court could not properly affirm except on the basis of the considerations which governed as each case was tried and as the issues were determined in the trial court. See also, Gregory v. City of Chicago, 394 U.S. 111 (1969); Bouie v. Columbia, 378 U.S. 347 (1964); cf. Cohen v. California, supra; Garner v. Louisiana, 368 U.S. 157 (1961).

Where, as here, it was unforeseeable that the trial court's concededly erroneous ruling, upon which turned the whole defense strategy at the trial, would subsequently be cured by appellate adoption of a new theory, 21/ the due process clause commands that petitioner's conviction be reversed. Since the case involves a failure of the circuit court to apply to a new situation principles enunciated by this Court in Cole, Eaton and other cases, the Court should grant this petition so as to assure the uniform application of the due process standards there set forth.

20/ For substantially the same reasons, petitioner's abandonment of his right to counsel was not made "knowingly and intelligently," Johnson v. Zerbst, 304 U.S. 458-, 464-65 (1938), because it was not a free choice "made with eyes open." Adams v. United States ex rel. McCann, 317 U.S. 269, 270 (1942). See Faretta, supra, 43 L.W. at 5013; cf. Argersinger v. Hamlin, 407 U.S. 25 (1972).

IV.

THE CASE PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY WHETHER AS A MATTER OF DUE PROCESS OF LAW, A JUDGE SUBSTITUTED FOR ANOTHER WHO HAS BEEN DISQUALIFIED FOR PREJUDICE IS REQUIRED TO CONSIDER DE NOVO ALL RULINGS OF HIS PREDECESSOR MADE AFTER AN AFFIDAVIT OF PREJUDICE WAS FILED.

Early on the morning of April 6, 1972, petitioner duly filed and served his affidavit of prejudice against Chief Judge Fais. The affidavit set forth numerous instances in which the judge had manifested open hostility toward petitioner's local and out-of-state counsel. Although it is clear under Ohio law that no further proceedings may be held during the pendency of a motion to disqualify, Moore v. State, 118 Ohio St. 487, 490 (1928), Judge Fais rendered adverse written opinions on numerous pre-trial motions after being served with recusal papers. In every instance he ruled against petitioners. 22/

22/ The pre-trial motions decided by Judge Fais after the filing of the affidavit of prejudice included an attack upon the jury rolls on the ground that black and young persons were systematically excluded; motion to dismiss due to selective arrest of petitioner on the basis of race; motion for bill of particulars; motion for discovery; motion for individual voir dire of prospective jurors; motion to suppress evidence and to dismiss due to electronic surveillance; motion for reassignment of a judge by lot; and the motion relating to Mr. Kunstler's admission pro hac vice.

In its opinion disqualifying Judge Fais, the Ohio appellate court expressly referred to the possibility of taint of these rulings. The Court said:

> "Through various statements and allegations, both in court and outside the court, it would appear that Judge Fais has been goaded into making statements which, combined with his rulings on said motions might be construed as bias on his part against either the defendant or his attorneys." 69a.
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> (emphasis supplied)

It is, of course, fundamental that a biased judge is barred by due process from sitting in a criminal case. Tumey v. Ohio, 273 U.S. 510 (1927). The fairness of a tribunal depends heavily on the judge that presides. Not only is it the actual bias of a judge which violates due process, but even the appearance of bias is intolerable. Ward v. City of Monroeville, 409 U.S. 57 (1972). The question then is what is the responsibility of a judge who replaces one who, after entering contested rulings, has been disqualified for bias and prejudice.

It would seem to be fundamental that the replacing judge must independently determine at least those rulings made after the claim of prejudice was asserted.

At common law, a completed act of a disqualified judge is void where the reason for his disqualification is bias and prejudice. 49 C.J.S. Judgments Section 17; Marks v. Smith, 60 S.E. 1016 (Ga. App.1908).

In Ward v. City of Monroeville, supra, this Court held that the mere appearance of bias--which the Ohio court found in Judge Fais --voids the ensuing judgment notwithstanding the right to a trial de novo because a defendant "is entitled to a neutral and detached judge in the first instance." 409 U.S. at 61-62. Here,in the absence of a trial de novo, petitioner properly demanded that all rulings be made in the first instance by an impartial judge.

The record is clear that Judge Reda did not make a wholly independent determination of the issues. By his own admission, Judge Reda deferred to Judge Fais' discretionary rulings.

On the afternoon of Thursday, July 6, 1972, immediately upon his assignment to this case, Judge Reda held a preliminary hearing, at which petitioner requested that all issues reached by Chief Municipal Judge Fais be considered de novo. Judge Reda's instant reaction was negative:

> You are asking that this Court review the decision by the Chief Justice of this Court on these motions?

To which counsel replied, "I'm asking that the Court * * * consider these motions anew as if they have never been considered * * * The decisions on those motions * * * were rendered after an affidavit of prejudice had been filed." Counsel continued by noting that the papers in the case were voluminous; at least nine motions had been fully briefed. Additionally, although Judge Fais had refused to receive any evidence on the motions, he had heard oral argument on not less than

three occasions. Transcripts were not in all instances immediately available.

Judge Reda adjourned the hearing to the following morning. At that time, he announced that overnight, he had read all of the moving papers, supporting and opposing briefs. He further declared that he would not "disturb" any of Judge Fais' decisions.

On the day of the trial, the defense requested that Judge Reda clarify his refusal to "disturb" Judge Fais' rulings. He was specifically requested to indicate whether he deemed Judge Fais' rulings "valid," or deemed them void, but had "ruled independently and anew on each of these motions."

Judge Reda evaded the question. On matters of substantive law, he "did not find any error" in Judge Fais' rulings. As to discretionary matters, including but not limited to"whether or not Mr. Kunstler would be permitted to serve as co-counsel," he "concurred with Judge Fais."

Mr. Twohig thereupon reframed the question:

> What would Your Honor's rulings be were that not what Judge Fais had decided?

Judge Reda then gave his closest approach to a direct answer:

> I feel this, that Judge Fais' decisions were not made under the stigma of prejudice, which would

> warrant, which would demand that some other judge completely review the whole matter.23/

In other words, Judge Reda did not rule de novo.

On appeal, petitioner assigned as error the failure to treat as absolutely void decisions made by a judge against whom a timely and sufficient affidavit of prejudice had previously been filed.

First, it declared that "[t]he record is clear that Judge Reda reviewed all of the various motions filed by defendant, and ruled thereon." 24/ (p. 59 a)

23/ Judge Reda obviously misread the decision of a superior court which specifically stated that Judge Fais' statements "combined with his rulings on said motions might be construed as bias on his part." The Court of Common Pleas never reached the question of actual bias, but Judge Reda insisted that no bias, only the appearance of bias, had been found.

24/ As to this, there is no dispute. The issue is not that he failed to review, but rather that he applied the wrong reviewing standard -- a standard which might be appropriate for an appellate court but not for a trial judge with a duty to remove all taint of prejudice.

The Court further found that Judge Reda "clearly indicated that he exercised his own independent discretion." (p. 60a) As the preceding transcript excerpts demonstrate, nothing could be further from reality.

In the alternative, the Franklin County Court of Appeals found that any failure to fully reconsider was harmless error. This finding was premised on the failure to appeal from any particular ruling except the one excluding Mr. Kunstler from participating in the trial.

No prior case suggests that void rulings in a criminal proceeding, if timely challenged, must be shown to be erroneous or to entail an abuse of discretion. Cf. Ward v. City of Monroeville, supra. The question raised on appeal was jurisdictional: Did Judge Reda commit jurisdictional error in deferring to Judge Fais' biased rulings? The answer to the question was dispositive of such crucial matters as the denial of a bill of particulars and the foreclosure of any challenge to the jury selection procedures, as well as the choice of counsel issue. But the answer given by the reviewing courts never addressed the fundamental issue: was the fatal taint of bias, in fact, perpetuated? By Judge Reda's admission, it was.

The United States District Court in considering the issue considered itself bound under 28 U.S.C. §2254(d), by the findings of the Court of Appeals of Franklin County (see Point V. infra.) and repeated the findings of that court. The

Court of Appeals for the Sixth Circuit said:

> "Our examination of the record convinces us that the substituted judge did in fact review the prior rulings and upheld them only after he determined they were correct."(13a)

But as pointed out above, the issue is not one of "review" but of untainted de novo determination. Accordingly, petitioner has been denied due process of law, in contravention of the Fourteenth Amendment, because his conviction reflects the full force and effect of rulings entered by a judge who was biased and acted beyond his authority.

This issue merits consideration by this Court because no decision by this Court deals with the application of the Due Process principles of Tumey and Ward to the situation where a judge has been replaced for reasons of prejudice.

V.

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY WHETHER A FEDERAL COURT ON HABEAS CORPUS IS BOUND BY "FACT" FINDINGS DERIVED FROM THE COLD TRANSCRIPT BY A STATE APPELLATE COURT WHICH SUPERCEDED ERRONEOUS FINDINGS BY THE STATE TRIAL COURT, WHERE THE POWER OF THE STATE APPELLATE COURT DOES NOT EXTEND TO FACT FINDING.

As with the two immediately preceding questions, the question here presented is unrelated to the merits of petitioner's claim of entitlement to representation by Mr. Kunstler. This question is instead concerned with the role of a federal habeas court when reviewing a state criminal conviction. Specifially, it addresses the types of state findings of fact which are precluded by §2254(d) from redertermination by the federal court. This question arises with respect to two determinations as to which the federal habeas court felt bound by "factual" determinations of the state appellate court:

a) whether Mr. Kunstler's statement could be read as a refusal under any circumstances to abide by Canon 7;

b) whether Judge Reda made an independent determination of the issues previously determined by Judge Fais.

Title 28, United States Code, §2254 is a legislative device designed to minimize the frictions generated by our constitutional commitment to a federal system

in which each state retains partial sovereignty, but in which the federal courts are charged with an independent responsibility to protect individuals from deprivations of federally protected rights by the state courts.

Subsection (d) of Section 2254 is substantially a codification of the constitutional principles enunciated by this Court in Townsend v. Sain, 372 U.S. 293, 312-319 (1963). It plainly does not bind the District Court to accept findings which are made by a court which lacked jurisdiction to make the same(sub-section 2254(d)(4)), or where the factual findings of the state court are not fairly supported by the record (sub-section 2254(d)(8)), or where the applicant was denied due process of law in the state court proceeding (sub-section 2254(d)(7)).

After the District Court made preliminary findings which are consistent with the arguments petitioner has maintained throughout the collateral proceedings, it proceeded to resolve the ultimate issues according to the factual determinations of the state appellate court, notwithstanding the district court's variant reading of the trial record. Thus, in disposing of the right-to-counsel issue, the district court declared:

> The Franklin County Court of Appeals found that Mr. Kunstler was not qualified to appear in the Franklin County Municipal Court on behalf of Mr. Ross because he 'would not comply with the standards established by Canon 7 of the Code of Professional Responsibility with respect

> to out-of-court statements . . .' Although the record is susceptible to a contrary interpretation, it is sufficient to support the State court's finding. A United States District Court is compelled to accept such a finding when, as here, it is supported by the record. 28 U.S.C. §2254(d) (emphasis added)(34a)

It is apparent from the foregoing that although it would not independently concur in the state appellate court's finding, the district court believed itself to be barred by subsection 2254(d) from re-examining them. The correct view is that stated in Hill v. Nelson, 466 F. 2d 1346, 1348 (9th Cir. 1972): subsection 2254(d) "provides no basis for . . . relying on factual statements contained in a state appellate opinion." See also Thomas v. Craven, 473 F. 2d 1235 (9th Cir. 1973); Hill v. Craven, 464 F. 2d 1293 (9th Cir. 1972).

In construing that subsection, the district court disregarded the following controlling factors:

1. The Franklin County Court of Appeals is without authority to enter supplementary factual findings in a criminal case. Its jurisdiction in criminal appeals is identical to that of the federal courts of appeals; it may only reach questions of law. See Page's Ohio Rev. Code §2501.02 (Supp., 1974); cf. Page's Ohio Rules of Appellate Procedure 12(B) (1974). If the district court correctly viewed the Franklin County Court of Appeals' findings as "factual" it was compelled to judicially notice that

such findings were beyond the jurisdiction of the state appellate court, and hence were of no legal force or effect. 28 U.S.C. §2254(d)(4).

2. The State appellate court findings, as pointed out above (Point III, supra), denied due process of law because they effected a fundamental change in the theory of the case. It is not conceivable that the federal court is bound by findings which entail a denial of due process. 28 U.S.C. §2254(d)(7).

3. The findings of the State appellate court literally have no foundation at all. We pointed out above that the district court deferentially said "the record is susceptible of a contrary interpretation." (34a). Actually, the record is not susceptible of the interpretation given by the State appellate court, and that Court finding "is not fairly supported by the record." 28 U.S.C. §2254(d)(8).

The rulings of the lower federal courts in this case reflect a patent misconstruction of subsection 2254(d).25/ Contrary to the district court's holding, affirmed sub silencio by the Sixth Circuit, federal habeas courts may not rely on state appellate findings. Thomas v. Craven, supra. State findings of fact "are not

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25/ The district court also adopted the State appellate court's finding that Judge Fais' bias had been fully cleansed from the record, again deferring to the affect of subsection 2254(d) on the Franklin County Court of Appeals' determination. (p. 34a.)

immune, when brought into question in federal habeas corpus, from district court consideration, and, in proper cases, from de novo consideration." England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 417 N. 8 (1964), citing Townsend v. Sain, supra.

This is such a proper case, at least with respect to those findings first made by the Franklin County Court of Appeals. As the Ninth Circuit has specifically held, it is only to the State court trier of fact that subsection 2254(d) accords deferrence. Anderson v. Nelson, 432 F. 2d 55 (9th Cir. 1970). Consequently, the district court had an affirmative duty to make independent determinations of the controlling issues, and not acquiesce, as it reluctantly did, in the Franklin County Court of Appeals' distortions of the record.

Section 2254 is a major stabilizing factor in balancing the competing interests of state sovereignty and constitutional supremecy. In effecting this baiance, that section was not intended, and must not be permitted, to function as a carpet under which injustices may be swept. See Hensley v. Municipal Court, 411 U.S. 345 (1973). Where, as here, lower federal courts erroneously have read subsection 2254(d) as a straightjacket barring review of constitutionally invalid findings by a state appellate court and thereby rendered themselves powerless to reach glaring errors, this Court's intercession is warranted.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment and opinion of the court below.

Dated: July 8, 1975

Respectfully submitted,

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* Counsel for Petitioners wish to express their gratitude for the invaluable assistance they received from Fred Gross, a law student at Rutgers University School of Law, in the preparation of this petition.

APPENDIX

First Amendment
Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment
Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment
Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment, Section 1
Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty or property, without due proces of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2254. State custody; remedies in Federal courts

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

OHIO REVISED CODE

§2909.21. Trespassing upon lands or premises of another. (GC §12522)

No person shall enter without lawful authority upon the land or premises of another, or being upon the land or premises of another, upon being notified to depart therefrom by the owner or occupant, or the agent or servant of either, without lawful authority neglect or refuse to depart therefrom.

Whoever violates this section shall be fined not more than fifty dollars or imprisoned not more than thirty days, or both.

§2901.25. Assault and battery, and menacing threats. (GC §12423)

No person shall assault or threaten another in a menacing manner, or strike or wound another.

Whoever violates this section shall be fined not more than two hundred dollars or imprisoned not more than six months, or both.

§2923.43. Interferring at scene of fire, accident, or other disaster.

No person shall willfully obstruct, impede or hamper in any way, the lawful operation of sheriffs, policemen, or

other law enforcement officers, or firemen, rescue personnel, medical personnel, or other authorized persons, at the scene of fire, accidents, disasters, or emergencies of any kind, and no person shall willfully fail to obey the lawful orders of sheriffs, policemen, or other law enforcement officers, engaged in the performance of their duties at the scene of or in connection with fires, accidents, disasters or other emergencies of any kind.

Whoever violates this section shall be fined not less than fifty dollars and not more than five hundred dollars or imprisoned in a county jail or workhouse not less than thirty days and not more than six months or both. Nothing in this section shall be construed to limit access or deny information to any news media representatives in the lawful exercise of their duties.

Canon 7 EC 7-33
of Code of Professional Responsibility
Adopted by the Supreme Court of Ohio

"A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established."

Disciplinary Rules
Dr. 7-107 B, C and D of
the Code of Professional Responsibility
Adopted by the Supreme Court of Ohio

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the com-

mencement of the trial or disposition without trial, make or participate in making an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C)DR 7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the acccused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

(D)During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

No. 74-1771

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES O. ROSS, *Petitioner-Appellant,* v. HONORABLE FRANK REDA, Judge, Franklin County Municipal Court, *Respondent-Appellee.*	APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed February 13, 1975.

Before: PHILLIPS, Chief Judge, MILLER, Circuit Judge, and DEMASCIO, District Judge.*

PER CURIAM. This is an appeal from an order denying the application of Charles O. Ross for a writ of habeas corpus. It is contended that refusal of the Ohio State trial court to admit out-of-state counsel *pro hac vice*[1] to represent Ross at his trial in that court deprived Ross of his Sixth Amendment right to counsel. The out-of-state attorney had been licensed to practice in other jurisdictions, but was not licensed to practice in Ohio. Reference is made to the decisions of the

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* Honorable Robert E. DeMascio, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

[1] This term refers to the practice of admitting out-of-jurisdiction attorneys who associate with in-state counsel for a particular case. It means literally "for this turn; for this one particular occasion." BLACK'S LAW DICTIONARY 1355 (4th ed. 1968).

BEST COPY AVAILABLE

Ohio Court of Appeals in *State* v. *Ross*, 36 Ohio App. 185, 304 N.E.2d 396 (1973), *cert. denied*, 415 U.S. 904 (1974), for a statement of the facts of this case. We affirm the denial of the writ.

While the Sixth Amendment right "[i]n all criminal prosecutions" to the "assistance of counsel" implies a degree of freedom to be represented by counsel of defendant's choice, this guarantee does not grant the unconditional right to representation in a state court by a particular out-of-state attorney. To the contrary, in *Thomas* v. *Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied*, 355 U.S. 958 (1958), the Court said:

> [I]t is well settled that permision to a non-resident attorney, who has not been admitted to practice in a court, to appear pro hac vice in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge.

Moreover, the Sixth Amendment claim is modified significantly by the actual availability and presence of other competent counsel.

Before his trial in the State court the defendant Ross had retained three lawyers who were licensed to practice in Ohio. These Ohio attorneys were ready and available to represent the defendant. Ross chose to discharge his Ohio lawyers and to present his own case. At least one of these attorneys remained in the courtroom throughout the trial and was available to Ross for consultation at all stages of the proceeding.

The prerogative of a trial judge to exclude out-of-state counsel, like the right of a defendant to be represented by the counsel of his choice, is not an absolute right. In the present case the state trial court denied the application of the out-of-state attorney for admission pro hac vice on the ground that he affirmatively refused to limit his out-of-court statements about the case during its pendency. In his order the

trial judge noted, among other reasons for denying the application, the following:

> [B]ut there is no question in the mind of this Court that the applicant's conduct was unprofessional and in violation of the Code of Professional Responsibility, particularly Canon 7, EC 7-36, DR 7-107 (A) (B); Canon 8, DR 8-102 (B); Canon 9, EC 9-1, 2, 6.

The Ohio Court of Appeals held that the refusal of the out-of-state counsel to limit his out-of-court statements about the case during its pendency constituted a potential violation of Canon 7 of the Ohio Canons of Ethics.

We view this justification as sufficient to warrant the legitimate exercise of the state's power to "require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar . . . ." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239 (1957). The states necessarily maintain this power over the admission of attorneys as an "incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." *Cohen* v. *Hurley*, 366 U.S. 117, 123-24 (1961); *see State* v. *Hurley*, 366 U.S. 117, 123-24 (1961); *State* v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968).

The judge who denied the application for out-of-state representation subsequently disqualified himself. The appellant contends that he was denied a fair trial because the judge chosen as a replacement relied on the prior judge's rulings, without making an independent investigation into their merits. Our examination of the record convinces us that the substituted judge did in fact review the prior rulings and upheld them only after he determined they were correct.

The decision of the District Court is affirmed. No costs are taxed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHARLES O. ROSS,	:	
	:	
Petitioner,	:	
	:	Civil Action
vs.	:	C 2 74-164
	:	
HONORABLE FRANK REDA, Judge	:	
Franklin County Municipal	:	
Court,	:	
Respondent.	:	

OPINION AND ORDER

Petitioner brings this petition for a writ of habeas corpus under the provisions of Title 28, United States Code, Section 2241(c)(3).

This matter is before the Court on the petition, return of writ, traverse, transcript of proceedings in State v. Ross, Case Nos. 13205, 13211, 13212 (Franklin County Municipal Court, March, April and July, 1972), and the briefs and exhibits of the parties.

In July, 1972, petitioner was convicted after a jury trial in the Franklin County, Ohio Municipal Court of failure to depart from school property in violation of Section 2909.21, Ohio Revised

Code; assault in violation of Section 2901.25, Ohio Revised Code; and interference at an emergency in violation of Section 2923.43, Ohio Revised Code. On July 31, 1972, he was sentenced to thirty (30) days imprisonment in the Franklin County Workhouse and given a one hundred fifty dollar ($150.00) fine.

Petitioner appealed the verdict to the Court of Appeals for Franklin County, Ohio. On March 20, 1973, the Court of Appeals issued a decision affirming the judgment of conviction. State v. Ross, 36 Ohio App. 2d 185 (Franklin Cty. Ct. App. 1973).

Petitioner then filed a notice of appeal and motion for leave to appeal to the Ohio Supreme Court. On September 6, 1973, the Ohio Supreme Court dismissed the appeal sua sponte on the ground that no substantial constitutional question was presented.

Petitioner then filed a petition for writ of certiorari in the United States Supreme Court. On February 19, 1974, the United States Supreme Court denied the petition for writ of certiorari.

Petitioner alleges that he is in custody 1/ in violation of the Constitution of the United States in that:

1. The trial court's refusal to permit defendant's retained out-of-state

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1/ Petitioner has already paid the $150.00 fine. He is to commence serving his thirty-day sentence in the Franklin County Workhouse on June 7, 1974. A prisoner is thus able to maintain an action for federal writ of habeas corpus, when his incarceration is not a speculative possibility. Hensley v. Municipal Court, ___U.S.___ (1973). Petitioner is, therefore, in custody within the meaning of 28 U.S.C. Section 2241 (c)(3).

attorney to represent him at trial was a deprivation of his right to the assistance of counsel of his choice as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. Critical pre-trial motions were decided by a biased judge who was later disqualified; and the trial judge refused to reconsider the prior ruling in violation of the Due Process clause of the Fourteenth Amendment to the United States Constitution.

3. His conviction for failure to depart after being told to do so by Bruce P. Hennick is not supported by any evidence that Bruce P. Hennick instructed him to leave the premises in question.

Respondent concedes that petitioner has exhausted his available state court remedies as to each of these claims for relief as required by 28 U.S.C. Section 2254(b)(c). 2/ Each of these claims for

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2/ In his petition and traverse, petitioner alleges that his arrest and prosecution was for the purpose of discrediting him because of his criticism of Columbus, and Ohio State University officials. These allegations were not presented to the trial court, court of appeals or supreme court. They cannot now be raised for the first time in federal habeas corpus. 28 U.S.C. Section 2254(b), (c).

relief will be discussed separately below.

In the spring of 1971, there were disruptions and some violence at Linden McKinley High School in Columbus, Ohio. In May it was closed for a few days. Linden McKinley High School reopened on May 25, 1971. On the morning of that day, a group of adult residents of the community, including petitioner, was present at the school. A principal at the school, Mr. Reed, made an announcement over the public address system notifying all non-students to leave the building and premises. The prosecution contended that petitioner then walked up to Columbus City Safety Director, James J. Hughes, Jr., and told him,"Hughes, you started a riot here." Mr. Hughes told petitioner that he had been ordered by the principal to leave the school. Petitioner refused to leave the building. Safety Director Hughes then ordered him arrested. He was removed from the building by two Columbus, Ohio police officers.

At the police station Richard Dimel attempted to take petitioner's fingerprints. Petitioner assaulted him by balling up his fist and stepping back as if to strike him.

I.

After the criminal charges were filed against petitioner, two local attorneys who are members of the Ohio bar, Bruce

A. Campbell, Esq. and William E. Boyland, Esq., filed an appearance as counsel for petitioner. On March 10, 1972, a second pretrial conference was held. Mr. Twohig was added as a co-counsel for defendant. At the pretrial, a motion was made to permit William Kunstler, Esq., an attorney not admitted to practice in Ohio, 3/ to appear on behalf of petitioner. Additionally, petitioner moved to represent himself as co-counsel.

On March 10, 1972, a motion was filed seeking the admission of William Kunstler, Esq., pro hac vice. On March 16, 1972, the motion was refiled.

On April 3, 1972, a hearing was held before Judge G.W. Fais on petitioner's motion for the admission of Mr. Kunstler, pro hac vice. No evidence was taken on the motion at the hearing. Mr. Kunstler did appear and address the Court.

3/ Mr. Kunstler is a member of the New York and District of Columbia bars. He has been admitted to practice before the United States Supreme Court, the United States Court of Military Appeals, and the United States Courts of Appeals for the Second, Third, Fourth, Fifth, Seventh, Tenth and District of Columbia Circuits. He has also appeared as counsel in numerous state and federal trial courts.

On April 6, 1972, Judge Fais issued an Opinion refusing Mr. Kuntsler permission to appear pro hac vice on behalf of petitioner. In his Opinion, Judge Fais made the following findings:

> This Court recognizes that prior to the application herein, the defendant had been represented by three local attorneys, all competent and reliable, and there is no question but that defendant's absolute right to counsel of his choice has not been abridged nor denied. None of the local counsel up to the time of the appearance of the applicant ever intimated or stated that the defendant could not, and would not, receive a fair and impartial trial free from bias, passion, prejudice and outside influences. However, with the appearance of the applicant this attitude and temperament suddenly changed.
>
> The first incident occurred when applicant appeared in the vicinity of this Court and held a "press conference" which had been announced in advance of his arrival in the City. During this conference the applicant questioned the integrity, the fairness and the dignity of this Court. Applicant also made mention of a rally later in the day

where the question was to be asked as to whether the defendant could get a fair trial in Columbus.

Such activity questions the propriety of this Court even before the trial is commenced. If such declarations, challenges and circumstances precede the commencement of the impaneling of a jury and the presentation of evidence, what can be expected on April 24, 1972, the date this trial by jury is ordered as well as the days consumed by the trial.

Applicant, in substance, issued a challenge to this Court by stating he had an absolute right to practice law for the purposes of this case. Also, he stated he had "no respect" for this Court during the course of the hearing. The applicant also interrupted the proceedings with his own remarks on other issues raised.

Also in the record is the threat made by applicant that if his Motion was denied, he would take the matter immediately to the federal court, which would materially block and delay the commencement of trial set for April 24, 1972.

Following the hearing, applicant participated in a "rally" at the Ohio State University with his co-counsel and the defendant. Defamatory comments were made about this Court; there was name calling, criticism and clamor directly relating to the issues to be tried. This Court does not feel that it need to point out in detail the applicant's activities at the "rally", but there is no question in the mind of this Court that the applicant's conduct was unprofessional and in violation of the Code of Professional Responsibility, particularly Canon 7, EC7-36, DR7-107(A)(B); Canon 8, DR8-102(B); Canon 9, EC 9-1, 2, 6.

This Court considers the unprofessional conduct on the part of this applicant to be deliberate, wilful and premeditated. The applicant is an officer of the Court with a solemn and serious obligation to his profession, to his client, to the Court and to the public. This Court finds that the applicant has not qualified himself to be admitted pro hac vice in this case, and therefore the application is denied.

On April 6, 1972, petitioner filed an affidavit of prejudice against Judge Fais in the Franklin County, Ohio Common Pleas Court. On July 6, 1972, the Common Pleas Court issued a decision disqualifying Judge Fais. In the Opinion the Court stated:

An examination of the various exhibits attached to plaintiff's file in this matter indicate a considerable amount of notoriety insofar as the case, the judge, the parties, and their counsel are concerned. It is extremely unfortunate that some cases are apparently tried at press conferences rather than in the courtroom.

Through various statements and allegations, both in court and outside the court, it would appear that Judge Fais has been goaded into making statements which, combined with his rulings on said motions might be construed as bias on his part against either the defendant or his attorneys.

* * *

In order to remove any suspicion as to the possibility of prejudice by Judge Fais, this court will disqualify him and appoint a successor Municipal Judge in accordance with Ohio Revised Code, §2937.20.

The Honorable Frank A. Reda, Franklin County Municipal Court Judge was selected by lot to preside over petitioner's case.

On July 6, 1972, counsel for petitioner requested reconsideration of the rulings that Judge Fais had made on prior motions, including the motion to admit Mr. Kunstler pro hac vice.

On July 7, 1972, Judge Reda announced his decision adopting the decisions of Judge Fais on the motions.

On July 10, 1972, Judge Reda heard further arguments on the motion to admit Mr. Kunstler pro hac vice. At the hearing, petitioner stated that:

> From the very beginning there was never any question that on the date this trial was to begin, that Bill Kunstler would be my lawyer and would handle the case here in the Court.

Mr. Kunstler testified that petitioner had designated him "Chief Counsel." Mr. Kunstler also stated that he had represented petitioner on criminal charges against him from the very beginning:

> I have represented Mr. Ross essentially from the beginning of all his legal problems. I came to Columbus in 1970 to represent Ronald Kay, a student who was charged with infractions of a disciplinary code of the Ohio State University. I represented him before that tribunal, he was acquitted of the charge. That's when I first met Charles Ross. This was in 1970, I think in the summer. Then, in 1971 when he was brought up on proceedings under 1219 I represented him before the same tribunal, and he was acquitted in that case. The charges were dismissed on Constitutional

> grounds. . . . I represented him in those two proceedings, and the moment this proceeding started in May of 1971 he asked me to represent him. I did so at the time when Mr. Twohig I don't think was in Columbus or was involved in the matter at all, and I represented him throughout. In fact, Your Honor, I brought my file to the Court to show the breadth of this file involving Charles Ross in all of these proceedings. I have represented him as chief counsel in this matter. He has asked me to be . . ..

Counsel for petitioner at the July 10, 1972 hearing objected to Judge Fais' decision denying Mr. Kunstler permission to appear on the ground that it was made without the taking of evidence and based entirely upon hearsay newspaper reports that Mr. Kunstler had engaged in unprofessional conduct at a press conference and rally. They stated that there were a number of erroneous newspaper articles which had appeared concerning petitioner's case. Mr. Kunstler specifically denied making the statements attributed to him in Judge Fais' Opinion.

At the July 10, 1972 hearing, Mr. Kunstler asserted that he should be permitted to represent Mr. Ross because he was an attorney in good standing. He argued further that:

> If I don't conduct myself as an attorney should in the

court room, Your Honor has procedures to either order me out. . . or take disciplinary action against me.

Judge Reda then questioned Mr. Kunstler:

I am concerned about your conduct outside of the court room. I have never met you before, Mr. Kunstler, but I had reports about your conduct. Not only in this jurisdiction but also in other jurisdictions outside the court room.

Now, do you have any statements that you would like to make to the Court with respect to what you believe an attorney's conduct should be outside the court room?

Mr. Kunstler responded, in relevant part:

Surely, Your Honor, I would be glad to. Outside the court room I have every right to all the First Amendment privileges of any other person. [Mr. Kunstler then referred to Chase v. Robson, 435 F. 2d 1059 (7th Cir. 1970.)] They said in that case that unless you can show by an evidentiary hearing that there is a clear and present danger to the administration of justice, no court can bind a lawyer or his client from speaking in a criminal matter outside the court room, from making extra-judicial statements. This is the standard which I have now adopted

> for myself. I think it's the law of the land, and I think it's clear. . . . So I would never promise Your Honor that I would not speak outside. I will speak outside, because I think to bind me would be unconstitutional and would make attorneys have different First Amendment rights than anybody else.. . .

The Court ruled that nothing new had been presented on the motion to admit Mr. Kunstler pro hac vice. Its previous decision was reaffirmed.

No pretrial order was ever entered concerning pretrial publicity or the out-of-court statements of counsel. The trial court did not indicate to counsel at any of the pretrial hearings that particular out-of-court conduct should be avoided.

The Court of Appeals for Franklin County, Ohio held that Mr. Kunstler's alleged out-of-court comments at a press conference and rally were not sufficient grounds to exclude him as counsel, because there was no evidence of record that Mr. Kunstler had in fact engaged in the alleged unprofessional conduct. State v. Ross, 36 Ohio App. 2d supra at 191. Newspaper articles are not sufficient grounds for a finding of fact concerning an attorney's conduct out of the presence of the court. Newspaper articles are inadmissible hearsay to prove the fact of improper out-of-court conduct. If such conduct is to be proven, witnesses who heard the attorney's out-of-court statement must be sworn under oath and subjected to cross examination. Neither Judge

Fais nor Judge Reda took evidence on the alleged improper professional conduct of Mr. Kunstler.

Instead, the Court of Appeals for Franklin County, Ohio based its decision upon two grounds not expressly relied upon by either Judge Fais or Judge Reda. First, the Court of Appeals held that:

> Each state has the right to regulate the practice of law within its jurisdiction, and to require that a person be admitted to practice by that state before he may be permitted to act as the attorney for any person in that state, including representation in a criminal matter. Thus, the constitutional right to representation by counsel was limited, with regard to the states, to counsel admitted to practice in that state, unless no competent counsel so admitted is available. Defendant makes no contention that the three Ohio attorneys representing him were not competent to do so.
>
> State v. Ross, 36 Ohio App. 2d. supra, at 187-188.

Second, the Court of Appeals held that Mr. Kunstler's statement to Judge Reda at the July 10, 1972 hearing that the Court did not have power to prohibit him from speaking outside the court room was in violation of Canon 7 of the Code of Professional Responsibility as adopted by the Supreme Court of Ohio. The Court of Appeals' analysis was as follows:

Canon 7 deals with the subject at hand. With respect to ethical considerations, EC 7-33 provides as follows:

> "A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established."

The disciplinary rules specifically deal with the question of trial publicity and DR 7-107(B) provides as follows:

> "A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the

issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) the character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) the possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) the existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) the performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) the identity, testimony or credibility of a prospective witness.

(6) any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case."

DR7-107(B) does not preclude a lawyer during such period from announcing:

(1) the name, age, residence, occupation, and family status of the accused.

(2) if the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) a request for assistance in obtaining evidence.

(4) the identity of the victim of the crime.

(5) the fact, time and place of arrest, resistance, pursuit, and use of weapons.

(6) the identity of investigating and arresting officers or agencies and the length of the investigation.

(7) at the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement.

(8) the nature, substance or text of the charge.

(9) quotations from or references to public records of the court in the case.

(10) the scheduling or result of any step in the judicial proceedings.

(11) that the accused denies the charges made against him."

DR7-107(D) deals specifically with out-of-court statements during trial, and provides as follows:

"During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case."

From Mr. Kunstler's statement, the trial court was justified in conclusing that Mr. Kunstler would not comply with the standards established by Canon 7 of the Code of Professional Responsibility with respect to out-of-court statements but, rather, would only comply with the lesser standard of Chase [v. Robson, 435 F. 2d 1059 (7th Cir.

1970)] as he interpreted that standard to be. We find Canon 7 of the Code of Professional Responsibility, as recommended by the American Bar Association and adopted by the Supreme Court of Ohio, to be a constitutionally valid regulation of the conduct of attorneys with respect to out-of-court statements concerning pending litigation. In fact, such Canon would seem to be required by Sheppard v. Maxwell, (1966), 384 U.S. 333 . . .

State v. Ross, 36 Ohio App. 2d supra at 193-196.

The assertion that a trial court has the unreviewable discretion to refuse to admit, pro hac vice, a criminal defendant's otherwise fully qualified counsel on the sole ground that he is not a member of the bar of the court's jurisdiction is untenable. The Sixth Amendment guarantees that

> [i]n all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense.

This right has always been regarded to be the right to have counsel of one's own choice. See, e.g. Powell v. Alabama, 287 U.S. 45, 69 (1932); Reynolds v. Cochran, 363 U.S. 525, 531 (1961); Chandler v. Fretag, 348 U.S. 3, 9-10 (1954); Bacher v. Commissioner of Internal Revenue, 275 F. 2d 141 (5th Cir. 1960); People v. Price, 262 N.Y. 410, 412, 187 N.E. 298, 299(1933); State v. Long, 166 S.E. 2d 365, 366 (Ga. App. 1969); Chivers v. State, 5 Ga. App.

654, 63 S.E. 703, 705 (1909). Admission to the bar of the State of prosecution cannot be the sole reason for disqualification of counsel.

It is undisputed that a State may "require high standards of qualification, such as good moral character or proficiency in its laws, before it admits an applicant to the bar . . ." Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 239 (1957). But if the counsel of a criminal's choice meets these standards, he should be admitted pro hac vice. United States v. Bergamo, 154 F. 2d 31 (3rd Cir. 1946); Magee v. Superior Court, 8 Cal. 3d 949, 954 (Calif. S. Ct. 1973) (In bank). See, Banks v. Holder, No. 73-1332 (7th Cir. May 17, 1973), cert. granted 14 Crim. L. Rptr. 4159 (1973), cert. dismissed as improvidently granted, 15 Crim. L. Rptr. 4061 (1974).

The Franklin County Court of Appeals found that Mr. Kunstler was not qualified to appear in the Franklin County Municipal Court on behalf of Mr. Ross because he "would not comply with the standards established by Canon 7 of the Code of Professional Responsibility with respect to out-of-court statements . . ." Although the record is susceptible of a contrary interpretation, it is sufficient to support the State court's finding. A United States District Court is compelled to accept such a finding when, as here, it is supported by the record. 28 U.S.C. §2254(d).

This Court concludes that, consistent with the factual determination of

the Franklin County Court of Appeals, petitioner was not deprived of his right to the assistance of counsel of his choice for the reason that because of his refusal to accept the conditions of Canon 7, Mr. Kunstler was not qualified for admission pro hac vice.

The Court HOLDS that petitioner's first claim for relief is without merit.

II.

Petitioner contends that he was denied a due process hearing on the pretrial motions which were originally decided by Judge Fais.

On April 6, 1972, petitioner filed a motion to disqualify a judge under §2937.20, Ohio Revised Code and to dismiss the criminal affidavits. The motion was accompanied by an affidavit alleging the prejudice of Judge Fais.

On the same day Judge Fais issued a decision refusing the admission of Mr. Kunstler as counsel pro hac vice.

On April 7, 1972, Judge Fais denied petitioner's motion to suppress evidence of electronic surveillance. 4/

On April 10, 1972, Judge Fais denied the following motions: motion for a bill of particulars; motion for discovery;

4/ Petitioner's counsel had previously conceded the motion was moot because the prosecution knew of no electronic surveillance of petitioner.

motion for an individual voir dire of prospective jurors; motion to dismiss the criminal affidavits because of the systematic exclusion of newly enfranchised young and black voters from the jury; and a motion to dismiss the criminal affidavits because of the selective arrest of petitioner on the basis of his race.

Petitioner did not appeal any of these adverse rulings.

The Court of Appeals for Franklin County, Ohio made a finding of fact with respect to this claim for relief which is binding on this Court. 28 U.S.C. §2254(d). The Court of Appeals found, and the record substantiates, "that Judge Reda reviewed all the various motions filed by defendant, and ruled on them." State v. Ross, 36 Ohio App. 2d supra at 202. 5/

The Court HOLDS that petitioner's second claim for relief is without merit, because it is not supported by the record.

5/ The Court of Appeals further found that:

> The record is clear that Judge Reda did not "allow" previous rulings to stand but, rather, reviewed all of the motions and made his own rulings thereon, which were the same in result as the previous rulings.
>
> State v. Ross, 36 Ohio App. 2d supra at 204.

III.

Petitoner contends that he was denied due process of law because the prosecution failed to prove, as alleged in the affidavit charging the crime, that Bruce P. Hennick instructed petitioner to leave the premises of Linden McKinley High School.

The petitioner was charged with failing to leave Linden McKinley High School after being notified to do so in violation of §2909.21, Ohio Revised Code. The affidavit stated that petitioner was ordered to leave by Principal Bruce Hennick. Proof at trial was that the order to leave the premises was in fact given by Principal Reed. The Court of Appeals held that petitioner was not prejudiced by the variance between the affidavit and the proof at trial. State v. Ross, 36 Ohio App. 2d supra at 207-208.

The due process clause of the Fourteenth Amendment requires that the conviction of a criminal defendant be based upon proof beyond a reasonable doubt as to each fact essential to prove the offense charged. In re Winship, 397 U.S. 358, 363-364 (1970). If a conviction is totally devoid of evidentiary support, it is unconstitutional under the due process clause of the Fourteenth Amendment. Garner v. Louisiana, 368 U.S. 157, 163 (1961); Gregory v. Chicago, 394 U.S. 111 (1969); Thompson v. Louisville, 362 U.S. 199 (1960). However, questions relating to the weight and sufficiency of the evidence are not cognizable in federal habeas corpus. Ballard v. Howard, 403

F. 2d 653 (6th Cir. 1968); Fernandez v. Klinger, 346 F. 2d 210 (9th Cir.) cert. denied, 382 U.S. 895 (1965).

There was sufficient evidence before the jury to prove each essential element of a violation of §2909.21, Ohio Revised Code. The error, if any, was trial court error which does not raise a federal constitutional question. See, Donnelly v. De Christoforo, ___ U.S. ___ (1974); Moore v. Illinois, 408 U.S. 786, 799 (1972); Reese v. Cardwell, 410 F. 2d 1125 (6th Cir. 1969).

The Court HOLDS that petitioner's third claim for relief is without merit.

WHEREUPON, the Court FURTHER HOLDS that the petition is without merit, and therefore it is DENIED.

This action is hereby DISMISSED.

_____
Chief Judge
United States District Court

THE STATE OF OHIO, APPELLEE, *v.* ROSS, APPELLANT.
[Cite as State v. Ross (1973), 36 Ohio App. 2d 185.]

Criminal procedure—Right to counsel—May be limited, how—Refusal to accept Ohio attorney—Out of state counsel—May be excluded, when—Waiver of right to counsel, when—No right to continuance—Fair trial Canon 7, Code P. R.

1. The constitutional right to be represented by counsel may be limited by a state to those persons admitted to practice in such state, unless there is no such competent counsel available.
2. Whether to permit representation by out-of-state counsel in addition to competent Ohio counsel is a matter lying within the sound discretion of the court, and where responses of such out-of-state counsel to an inquiry by the court justifies the court in concluding that such counsel will not comply with the standards established by Canon 7 of the Code of Professional Responsibility, the court does not abuse its discretion in denying representation by such out-of-state counsel.
3. Where an accused is lawfully denied the right to be represented by out-of-state counsel, his refusal to proceed with his retained competent Ohio attorney is a waiver of his constitutional right to counsel.

(No. 72AP-229—Decided March 20, 1973.)

APPEAL: Court of Appeals for Franklin County.

Mr. James J. Hughes, Jr., city attorney, *Mr. Daniel W. Johnson*, city prosecutor, and *Mr. Carl T. Wolfrom*, for appellee.

Mr. R. Raymond Twohig, Jr., for appellant.

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WHITESIDE, J. This is an appeal from a judgment of the Franklin County Municipal Court.

Defendant was arrested on May 25, 1971, during a disturbance at Linden-McKinley High School in Columbus, Ohio. Three affidavits were filed against defendant as an outgrowth of this incident: (1) that he willfully obstructed, impeded and hampered the lawful operations of the safety director of the city of Columbus at the scene of an emergency, in violation of R. C. 2923.43; (2) that he did, on May 25, 1971, upon being notified to depart from the premises of Linden-McKinley High School by a servant of said school, neglect and refuse to depart therefrom, in violation of R. C. 2909.21; and (3) that he, on the same date, did unlawfully assault Richard F. Dimel, in violation of R. C. 2901.25.

Defendant was originally represented by attorneys Bruce A. Campbell and William E. Boyland, and a pretrial was held on June 25, 1971. At this pretrial, motions filed by defendant were discussed and it was agreed that the case would not be assigned for trial until after the middle of September, 1971. The trial did not take place at that time and a second pretrial was held on March 10, 1972. At this time, R. Raymond Twohig, Jr., was added as one of the attorneys for defendant, and a motion was made to permit Mr. William Kunstler, an attorney in another state not admitted to practice in Ohio, to also appear on behalf of defendant, and also to permit the defendant to represent himself as co-counsel with the other counsel. Additional motions were also filed on behalf of defendant, and the case was set for trial on Monday, April 24, 1972. The motions to permit Mr. Kunstler to appear as one of the attorneys for defendant was overruled, as was the motion to permit defendant to act as his own co-counsel.

The trial did not take place April 24, 1972, due in part to successful efforts on the part of defendant to have the trial judge presiding over the case replaced. A trial judge was selected by lot, and the case proceeded to trial on July 10, 1972. Prior to trial, the trial judge reviewed all the motions filed on behalf of defendant and reached the same conclusions as were originally reached. The new trial judge, Judge Reda, listened to extensive arguments on behalf of permitting Mr. Kunstler to represent defendant, and on the day of trial again overruled the motion. Defendant, thereupon, dismissed and discharged his three Ohio counsel, but the trial proceeded nevertheless. The trial resulted in a jury verdict of guilty to all three charges.

Defendant appeals raising four assignments of error as follows:

"1. The trial court's refusal to permit defendant to be represented by his experienced out-of-state attorney who is a member in good standing of numerous federal and state bars, and who stands convicted of no contempt of court and is without a disciplinary blemish on his record during years at the bar, violated defendant's right to counsel of his choice under the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article I, Section 10 of the Ohio Constitution, as well as the First Amendment of the United States Constitution, and was without factual or legal basis.

"2. The failure of the trial judge to treat as void the prior rulings in this case of another municipal judge who had been disqualified due to bias and prejudice and especially those rulings made after the filing of the Affidavit of Prejudice, violates the right to due process protected by the Fourteenth Amendment to the United

States Constitution and the Ohio Constitution, as well as Section 2937.20 of the Ohio Revised Code.

"3. The arrest of appellant for a misdemeanor by the Director of Public Safety is contrary to Section 2935.03 of the Ohio Revised Code.

"4. The conviction for failure to depart after being told to do so by Bruce P. Hennick is not supported by any evidence that Bruch [sic] P. Hennick instructed defendant to leave the premises in question."

By his first assignment of error, defendant contends that the Sixth and Fourteenth Amendments to the United States Constitution, and Section 10, Article I of the Ohio Constitution give to him the right to be represented by any counsel of his choice, whether or not such counsel is an attorney admitted to practice in Ohio. Each state has the right to regulate the practice of law within its jurisdiction, and to require that a person be admitted to practice by that state before he may be permitted to act as the attorney for any person in that state, including representation in a criminal matter. Thus, the constitutional right to representation by counsel is limited, with regard to the states, to counsel admitted to practice in that state, unless no competent counsel so admitted is available. Defendant makes no contention that the three Ohio attorneys representing him were not competent to do so.

The general policy of Ohio is expressed in R. C. 4705.01 as follows:

"No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct, or defend any action or proceeding in which he is not a party concerned, either by using or subscribing his own name, or the name of another person, unless he has been

admitted to the bar by order of the supreme court in compliance with its prescribed and published rules. Admission to the bar shall entitle such person to practice before any court or administrative tribunal without further qualification or license."

It has, however, been generally recognized that an attorney not admitted to practice in Ohio, but in good standing in another state, may be specially admitted for the purpose of representing a person in a particular case, be it civil or criminal. Whether or not so to specially permit an attorney not admitted to practice in Ohio, but admitted to practice and in good standing in another state, to represent a party in a particular action, is a matter lying within the sound discretion of the trial court. Thus, we must determine whether there has been an abuse of discretion in this instance.

While R. C. 4705.01 does not specifically provide for such special permission of out-of-state attorneys to appear in litigation in Ohio, it is recognized by Section 8(C) of Gov. R. 1, as follows:

"An applicant under this section shall not engage in the practice of law in this state prior to the filing of his application. To do so constitutes the unauthorized practice of law and will result in a denial of the application. This paragraph (C) does not apply to participation by a nonresident of Ohio in a cause being litigated in this state when such participation is with leave of the judge hearing such cause."

This practice also is recognized by the ethical considerations of Canon 3 of the Code of Professional Responsibility, adopted by the Supreme Court of Ohio. EC 3-9 provides as follows:

"Regulation of the practice of law is accomplished principally by the respective states. Authority to engage

in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice."

Notice should also be made of the disciplinary rules of Canon 3, DR 3-101(B) of which provides that:

"A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

In *Parker* v. *Parker* (Fla. 1957), 97 So. 2d 136, the court interpreted the rule of the Florida Supreme Court providing that "A practicing attorney of another state, in good standing, who had professional business in a court of record of this state may, upon motion, be permitted to practice for the purpose of such business only, when it is made to appear that he has associated and appearing with him in such business an active member of the Florida Bar." The court at 137, expressly held: "The right of an attorney of another state to practice is permissive and subject to the sound discretion of the court to which he applies for the permission." The Supreme Court of New Jersey considered a similar con-

tention in *State v. Kavanaugh* (1968), 52 N. J. 7, 243 A. 2d 225, stating, at 18, 243 A. 2d 231:

"Mr. Bailey's clients urge a constitutional right to select an attorney who is not a member of our Bar. So long as the Bar of our State is able, willing and free to provide effective counsel, there is no such right. *Thomas v. Cassidy*, 249 F. 2d 91 (4 Cir. 1957), certiorari denied, *Fitzgerald v. Cassidy*, 355 U. S. 958, 78 S. Ct. 544, 2 L. Ed. 2d 533 (1958); *People of State of New York v. Epton*, 248 F. Supp. 276 (S. D. N. Y. 1965); see *Parker v. Parker*, 97 So. 2d 136 (Dist. Ct. App. Fla. 1957); *Johnson v. DiGiovanni*, 347 Mich. 118, 78 N. W. 2d 560, 565 (Sup. Ct. 1956). This is not a situation in which no member of the local Bar will act. See *Lefton v. City of Hattiesburg, Mississippi*, 333 F. 2d 280 (5 Cir. 1964). There is no dearth of competent attorneys in our State ready to meet the constitutional right to counsel. There is nothing provincial about the requirement for admission to practice in the courts of a State. The courts of every jurisdiction must have control of practice before them as an 'incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied.' *Cohen v. Hurley*, 366 U. S. 117, 123-124, 81 S. Ct. 954, 958, 6 L. Ed. 2d 156, 162 (1961).

"Defendants refer to *United States v. Bergamo*, 154 F. 2d 31 (3 Cir. 1946), but that case dealt with practice in the federal courts. This was made clear in *Cooper v. Hutchinson*, 184 F. 2d 119 (3 Cir. 1950), where the same court described as 'startling' the suggestion that the courts of the States are bound to permit out-of-state attorneys to practive before them (p. 122). The *Cooper* case goes no further than to say that a constitutional issue is projected if an attorney admitted *pro hac vice* is removed in midstream for no reason at all and without

a chance to be heard. See *Laughlin v. Eicher*, 79 U. S. App. D. C. 266, 145 F. 2d 700 (D. C. Cir. 1944), certiorari denied, 325 U. S. 866, 65 S. Ct. 1403, 89 L. Ed. 1985 (1945); *United States v. Madsen*, 148 F. Supp. 625, 16 Alaska 651 (D. Alaska 1957)."

The original trial judge, who was later disqualified, rendered a written decision denying the application for participation of the out-of-state counsel, indicating that the decision was predicated, at least in part, upon a finding of unprofessional conduct by the out-of-state attorney in connection with a press conference and rally. At the hearing before Judge Reda, on July 10, 1972, one of the Ohio counsel for defendant stated, with respect to that decision:

"[It] was made without taking evidence, Your Honor. And it was entirely outside of the record and must have been based on hearsay. I don't know where it came from. It may have come from an erroneous newspaper article, there have been a number of them connected with this case."

Except for the decision, and argument at the July 10th hearing, we find no reference in the record to the press conference or rally.

However, at the July 10, 1972, hearing, Judge Reda directed the following to Mr. Kunstler:

"* * * I am concerned about your conduct outside the court room. I have never met you before, Mr. Kunstler, but I had reports about your conduct. Not only in this jurisdiction but also in other jurisdictions outside the court room.

"Now, do you have any statements that you would like to make to the Court with respect to what you believe an attorney's conduct should be outside of the court room?"

Mr. Kunstler replied, in pertinent part, as follows:

"Surely, Your Honor, I would be glad to. Outside of the court room I have every right to all the First Amendment privileges of any other person. I might add to Your Honor that the United States Court of Appeals for the Seventh Circuit ruled on that not in my case, in a case long before mine, where they held that an order of a District Judge forbidding lawyers to speak on the case before the Court outside the court was unconstitutional and granted mandamus, which is Chase versus Robeson [sic]. I think 1969 or '70 in the Seventh Circuit. And they said in that case, and I lived by that case since then, they said in that case that unless you can show by an evidentiary hearing that there is a clear and present danger to the administration of justice, no court can bind a lawyer or his client from speaking in a criminal matter outside the court room, from making extrajudicial statements. This is the standard which I have now adopted for myself. I think it's the law of the land, and I think it's clear. It has just been litigated both in New York and Florida and found to be exactly that. So I would never promise Your Honor that I would not speak outside. I will speak outside, because I think that to bind me would be unconstitutional and would make attorneys have different First Amendment rights than anybody else. But I say that I will stay within the bounds of that court decision, which is the law of this land, Chase versus Robeson [sic] and I will stay within the bounds of that decision as I have. * * *"

In *Chase v. Robson* (C. C. A. 7, 1970), 435 F. 2d 1059, the Federal District Court had entered an order restricting out-of-court comments by parties and counsel. The trial court order was predicated in part upon the following, as quoted by the Circuit Court of Appeals, at pages 1060-1061:

" 'This court takes judicial notice of the fact that one of the attorneys in this case, William C. Cunningham, was co-counsel in a similar case arising out of a raid upon a Selective Service office in Catonsville, Maryland. *United States v. Moylan*, 417 F. 2d 1002 (4th Cir. 1969). Also counsel of record in the appeal of the *Moylan* case was one William M. Kunstler, who has repeatedly and brazenly transgressed the local rules of this District Court, the Canons of Professional Ethics, and the spirit of the *Sheppard* decision *(Sheppard v. Maxwell*, 384 U. S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600) by continuous inflammatory public statements concerning jurors, witnesses, evidence, the judge, and rulings by the court throughout the course of the trial in *United States v. Dellinger et al.*, No. 69 CR 180.

" '* * *.

" 'Counsel in this case is experienced with the problems inherent in a case involving controversial issues and defendants. From his association with Kunstler, he should also be aware of the irreparable damage wrought to our legal system and to the dispassionate rule of law which occurs when counsel and parties engage in a strategy designed to inflame public passion and prejudice. Such misconduct destroys one or both parties' right to trial in a calm and serene atmosphere which the Supreme Court directed trial judges to maintain in the *Sheppard* decision.' "

In commenting upon this aspect of the case, the court of appeals stated, at page 1061:

"Any associations that one of the defendants' attorneys may have had or continues to have with another attorney not involved in this case is irrelevant and not in any way supportive of the trial court's order."

The court did hold, at page 1061, as follows:

"We hold that before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of

freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice.' *Craig v. Harney*, 331 U. S. 367, 373, 67 S. Ct. 1249, 1253, 91 L. Ed. 1546 (1947). Applying either the standard that the speech must create a 'clear and present danger,' *Wood v. Georgia*, 370 U. S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962), of a serious and imminent threat to the administration of justice or the lesser standard that there must be a 'reasonable likelihood,' *United States v. Tijerina*, 412 F. 2d 661 (10th Cir. 1969), of a serious and imminent threat to the administration of justice, we hold that the trial court's order is constitutionally impermissible."

Chase dealt with rules imposed by a trial court with respect to the trial of a single case and did not involve general rules prescribed for the conduct of attorneys such as are contained in the Code of Professional Responsibility adopted by the Supreme Court of Ohio. Canon 7 deals with the subject at hand. With respect to ethical considerations, EC 7-33 provides as follows:

"A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established." The disciplinary rules

specifically deal with the question of trial publicity and DR 7-107(B) provides as follows:

"A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

"(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

"(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

"(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

"(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

"(5) The identity, testimony, or credibility of a prospective witness.

"(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case."

DR 7-107(C) provides certain announcements that may be made by attorneys and provides as follows:

"DR 7-107(B) does not preclude a lawyer during such period from announcing:

"(1) The name, age, residence, occupation, and family status of the accused.

"(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

"(3) A request for assistance in obtaining evidence.

"(4) The identity of the victim of the crime.

"(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

"(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

"(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

"(8) The nature, substance, or text of the charge.

"(9) Quotations from or references to public records of the court in the case.

"(10) The scheduling or result of any step in the judicial proceedings.

"(11) That the accused denies the charges made against him."

DR 7-107(D) deals specifically with out-of-court statements during trial, and provides as follows:

"During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case."

It is readily apparent that the guidelines of *Chase*, *supra*, are inconsistent with Canon 7 of the Code of Professional Responsibility, as adopted by the Supreme Court of Ohio. From Mr. Kunstler's statement, the trial court was justified in concluding that Mr. Kunstler would not comply with the standards established by Canon 7 of the Code of Professional Responsibility with respect to out-of-court statements but, rather, would only comply

with the lesser standard of *Chase* as he interpreted that standard to be. We find Canon 7 of the Code of Professional Responsibility, as recommended by the American Bar Association and adopted by the Supreme Court of Ohio, to be a constitutionally valid regulation of the conduct of attorneys with respect to out-of-court statements concerning pending litigation. In fact, such canon would seem to be required by *Sheppard v. Maxwell* (1966), 384 U. S. 333, 86 S. Ct. 1507, wherein it is stated, at pages 361, 86 S. Ct. at 1521, 1522:

"More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See *State v. Van Duyne*, 43 N. J. 39, 389, 204 A. 2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements."

The Supreme Court further stated, at page 363, 86 Sup. Ct. at 1522, as follows:

"The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

Also referred to before the trial court was the matter

of the contempt charges growing out of the Chicago trial. Mr. Kunstler stated, in this regard:

"* * * One of the reasons Judge Fais gave was my contempt of court convictions in Illinois growing out of the Chicago trial, and those convictions have been reversed. Not only reversed, but half of them thrown out as being unwarranted, and the rest ordered for a new trial before a jury and out of the jurisdiction of the district judge in Illinois. * * * They are at this point not germane to practice anywhere else in the United States in my opinion, because they are reversed. * * *"

In connection with our overruling of a motion to permit out-of-state counsel to participate in the prosecution of this appeal, we set forth four non-exclusive questions that may be utilized, three of which are pertinent to the trial court, the fourth being whether such out-of-state counsel represented the party at the trial in the lower court. These three questions are:

(1) Did there exist a long-standing close personal relationship between the party and the out-of-state counsel? (2) Is the out-of-state counsel the customary counsel for the party in jurisdictions where such out-of-state counsel is admitted to practice? and (3) What is the situation with respect the availability of counsel admitted to practice in Ohio who are competent to represent the party in the case? There is no contention that the second and third of these questions apply. There has been some contention that the first does.

At the July 10, 1972, hearing before Judge Reda, Mr. Kunstler stated:

"* * * I have represented Mr. Ross essentially from the beginning of all his legal problems. I came to Columbus in 1970 to represent Ronald Kay, a student who was charged with infractions of a disciplinary code of the Ohio State University. I represented him before that

tribunal, he was acquitted of the charge. That's when I first met Charles Ross. This was in 1970, I think in the summer. Then in 1971 when he was brought up on proceedings under 1219 I represented him before the same tribunal, and he was acquitted in that case. The charges were dismissed on Constitutional grounds. * * * I represented him in those two proceedings, and the moment this proceeding started in May of 1971 he asked me to represent him. I did so at the time when Mr. Twohig I don't think was in Columbus or was involved in the matter at all, and I represented him throughout. In fact, Your Honor, I brought my file to the Court to show the breadth of this file involving Charles Ross in all of these proceedings. I have represented him as chief counsel in this matter. He has asked me so to be. * * *"

The defendant himself stated that Mr. Kunstler "has been my attorney now for more than a year and a half."

The record, however, reflects that the defendant was represented by Messrs. Campbell and Boyland from May 1971 to March 1972, with no indication of any representation by other counsel. In March 1972, Mr. Twohig was added as counsel and, at approximately the same time, a motion for participation by Mr. Kunstler was made for the first time. At the March 10, 1972, pretrial, Mr. Boyland stated as follows:

"* * * It is my understanding that Mr. Twohig will be mainly responsible for the case so far as trial of the case and pretrial matters are concerned. * * *" Contrary to this, the defendant stated at the July 10th hearing:

"* * * But from the very beginning there was never any question that on the date this trial was to begin, that Bill Kunstler would be my lawyer and would handle the case here in the court. * * *" Mr. Kunstler also stated that "* * * He asked for me to be his chief counsel.* * *"

Furthermore, Mr. Kunstler, in a letter "motion" dated

March 15, 1972, and filed with the trial court on March 16, 1972, stated as follows:

"This is to inform you that I represent Professor Ross in the above cases as co-counsel. While I may not be present at every session of court due to prior commitments, I will continue to so represent him in conjunction with his other attorneys and himself."

In *United States v. Bergamo* (C. C. A. 3, 1946), 154 F. 2d 31, there is some similarity to this case. In that case, the federal district court denied admittance to a nonresident counsel, and the resident counsel declined to proceed with the case. However, the federal district court denied a continuance to the resident counsel, who contended that he was not familiar with the case. Not only did *Bergamo* involve a federal district court, not a state court, but, unlike this case, the resident counsel was not familiar with the case. Here, there can be no doubt of the familiarity of the Ohio counsel with this case. They have participated throughout. Furthermore, the defendants in *Bergamo* were nonresidents, and the out-of-state counsel by whom they wished to be represented was an attorney admitted to practice in the state of which they were residents.

Here, an Ohio resident seeks to be represented by an attorney who is not admitted to practice in Ohio. By Mr. Kunstler's own statement, he first became acquainted with the defendant in the summer of 1970 during a university disciplinary proceeding in Ohio involving another person, less than a year before the institution of the present litigation. Defendant stated: "From the very beginning there was never any question" that Mr. Kunstler "would be my lawyer and would handle the case here in court." However, the record indicates that the defendant was personally present at both the June 25, 1971, and March 10, 1972, pretrials. No mention or indication of any intention to request leave for Mr. Kunstler to rep-

resent defendant was made at the June 25, 1971 pretrial. As indicated above, at the March 10, 1972 pretrial, it was indicated that Mr. Twohig would be "mainly responsible" for the trial of the case, although a request for Mr. Kunstler's *pro hac vice* admission was made at that time.

In support of a motion to dismiss, filed on behalf of defendant on June 25, 1971, by his original counsel, certain newspaper articles pertained to administrative proceedings with respect to his position as a faculty member of Ohio State University. Those articles indicate that Mr. Boyland, as well as Mr. Kunstler, represented the defendant during those proceedings, and that Mr. Kunstler departed from Columbus during the proceedings, leaving the defense primarily in the hands of Mr. Boyland. Although these newspaper articles constitute hearsay, they were submitted by defendant and, if correct, would indicate that Mr. Boyland had represented the defendant for approximately the same length of time that defendant contended Mr. Kunstler had, as would Mr. Boyland's initial representation of defendant in this case.

Defendant further relies upon *Spanos v. Skouras Theatres Corporation* (C. C. A. 2, 1966), 364 F. 2d 161, in support of his contention that he had a right of representation by an out-of-state attorney. That case does not so hold. First, that case involved an out-of-state attorney who sought to recover legal fees for legal advice and assistance given in connection with an antitrust suit in a New York federal court by an attorney not admitted to the bar of New York or of the federal court involved. No *pro hac vice* admission was involved, since the client discharged the attorney in that case, but the court of appeals stated that there was "not the slightest reason" to believe that such admission would have been denied. Thus, the issue before the court was whether the client could avoid

paying an out-of-state attorney whom he had employed over a period of five years for legal advice and assistance in connection with an antitrust suit, solely upon the grounds that such out-of-state attorney was not licensed to practice law in the jurisdiction involved. A holding that, under such circumstances, the client could not escape responsibility for paying the out-of-state attorney for legal advice and assistance in connection with litigation in federal court, hardly constitutes authority for the proposition that there is a constitutional right to employ out-of-state attorneys to defend a resident of a state on state criminal charges pending in a state court of which the defendant is a resident.

There is, in *Spanos*, certain dictum which can be quoted out of context, to support defendant's position, such as that contained at page 170:

"In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective, subject only to valid rules of courts as to practice before them."

The circuit court of appeals also stated, at 170, that "under the privileges and immunities clause of the constitution, no state can prohibit a citizen with a thorough claim or defense, from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state." Even assuming this to be a correct statement of the law, and applicable in the instant case, there was nothing in the trial court's order refusing Mr. Kunstler *pro hac vice* admission to conduct the trial of the case which prevented him from collaborating with defendant's Ohio lawyers and giving legal advice concerning any possible federal defense that could be asserted therein. Defendant's Ohio lawyers were free

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to consult with Mr. Kunstler and seek legal advice from him respecting trial strategy and procedure.

Considering all the attendant circumstances, we find that Judge Reda did not abuse his discretion in denying the request for *pro hac vice* admission of Mr. Kunstler.

Defendant further relies upon the case of *Argersinger v. Hamlin* (1972), 92 S. Ct. 2006, decided June 12, 1972. Even if that case were applicable, it would relate only to one of the three affidavits involved, since only a fine was imposed as a penalty with respect to the other two. Only in case number 13205 in the trial court was imprisonment imposed as a penalty. The United States Supreme Court expressly held that its decision in *Argersinger* was limited to situations where imprisonment is imposed, stating: "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial."

Such a waiver is present in the instant case, with regard to representation by counsel. Defendant elected not to be represented by local counsel at his trial unless Mr. Kunstler also could participate in the trial. Defendant knowingly and intelligently waived his right to representation by counsel, choosing instead to rely upon his claim that he had a right to be represented by counsel not admitted to practice in Ohio. Defendant chose to take his chances of being successful upon that issue on appeal, rather than to be represented by counsel at his trial. Since we find that defendant's contentions in this regard are without merit, and that the trial court did not abuse its discretion, the defendant cannot be heard to complain because he was not represented by Ohio counsel at his trial.

Furthermore, defendant on March 16, 1972, filed a motion in the trial court seeking *pro hac vice* admission of Mr. Kunstler and permission for defendant to represent

himself as co-counsel. While that motion provides space for signatures by the defendant and Mr. Twohig, as well as Mr. Kunstler, it is signed only by Mr. Kunstler. Significantly, it states in part:

"3. A critical part of Professor Ross' case is an examination of the political motivations of some prosecution fitnesses in order to establish their lack of credibility.

"4. The direct opposition of those motivations to the political philosophies of Professor Ross was the direct cause of his arrest.

"5. This inquiry into political motives requires that counsel has the fullest and most direct comprehension of Professor Ross' political philosophy, past activities and the reports of these activities.

"6. Attorneys for Professor Ross confess their inability to fully and adequately conduct that inquiry, and represent that Professor Ross is best qualified to do so."

By signing this application, Mr. Kunstler represented to the court his "inability to fully and adequately conduct that inquiry." At trial, the defendant did not conduct that inquiry which, it was represented, he was "best qualified to do."

The first assignment of error is not well taken.

Likewise, the second assignment of error is not well taken. The record is clear that Judge Reda reviewed all of the various motions filed by defendant, and ruled on them. Judge Reda's original decision on the various motions filed by defendant appears in the record as document No. 50. In that decision, Judge Reda enumerates the various motions filed by defendant. Judge Reda, at that time, stated: "I have examined all of the motions and a lengthy memoranda submitted by both parties and see no good reasons for disturbing the decision of Judge Fais in any way." Judge Reda reiterated his position prior to trial on July 10th, stating:

"Mr. Twohig, I indicated to you on Friday, last Friday at 9 o'clock, what I had done was I had read all of the motions, I had read the memoranda that was submitted by you and by the attorney for the State of Ohio. I indicated that some of the motions that you filed involved issues that directed themselves to application of substantive law, * * * That your other motions directed themselves to the issues that pertained to discretion of the Court. * * * And I indicated that I did not find any error in the application of the substantive law with regard to your motions by Judge Fais.

"And I also indicated that as far as those motions that had to do with an exercise of the discretion of the court, that I would not disturb them. * * *

"So what I indicated to you was that I concur with Judge Fais not only in his rulings as far as substantive law is concerned, but I concurred with Judge Fais also in those matters where he has exercised his discretion."

It is true that Judge Reda did state subsequently: "It's my feeling that where a judge of this court has ruled upon a substantive matter of law, that it would be highly improper for another judge of this court to substitute his judgment for the judgment of Judge Fais."

It will be noted that Judge Reda clearly limited the application of this philosophy to issues of substantive law. As to discretionary matters, he clearly indicated that he exercised his own independent discretion, although concurring with Judge Fais. As to the discretionary matters, especially the matter of representation by out-of-state counsel, Judge Reda devoted a considerable amount of time to a consideration of the issues, and permitted extensive arguments and hearings thereon.

Even assuming that Judge Reda did not fully consider the issues of substantive law involved, and that this constituted error, it would not be prejudicial error, unless the rulings on such issues of substantive law were errone-

ous. Defendant, with one exception, makes no contention herein that any of the rulings were erroneous, and, with the one exception, makes no assignment of error with respect to any of the rulings upon the motions involving issues of substantive law. Likewise, the only issue raised independently by defendant, with respect to the discretionary matters, is that involving representation by out-of-state counsel. The record is quite clear that Judge Reda exercised his own independent judgment in that matter. The only substantive law issue raised by defendant is that raised by the third assignment of error.

Judge Reda made an independent review of all the motions filed by defendant. He clearly stated that he concurred in the rulings previously made and found no error in those involving substantive law. Defendant has not demonstrated, or even raised the issue, except in the one instance, that any of the rulings involving issues of substantive law were erroneous. As to all discretionary matters, Judge Reda exercised his own discretion, and defendant has not demonstrated any abuse of that discretion. Accordingly, there is no prejudicial error in the manner in which Judge Reda considered the various motions. In fact, we find no error in the manner in which he did consider them. Judge Reda did not merely adopt all of the rulings previously made by Judge Fais. Rather, Judge Reda reviewed all of the motions and the memoranda submitted in support and in opposition thereto. The record clearly indicates that he was fully conversant with the motions and the issues raised thereby. There is no indication that the rulings would have been different had they not first have been ruled upon by Judge Fais. On the contrary, Judge Reda expressly stated that he concurred in all of the prior rulings. In fact, it is not at all clear from the record or from the argument in this court, exactly what defendant wished Judge Reda to do

in addition. Defendant, in his brief herein, states that, "Judge Reda committed unquestionable error by allowing those rulings to stand." However, the record is clear that Judge Reda did not "allow" previous rulings to stand but, rather, reviewed all of the motions and made his own rulings thereon, which were the same in result as the previous rulings.

By his third assignment of error, defendant contends that his arrest was illegal, contending that he was arrested by the director of public safety and that the director of public safety has no power of arrest. The record indicates that, although the words involved may have been spoken by the director of public safety, the actual physical arrest was made by a police officer, apparently acting under the direction of the director of public safety, his superior.

Defendant contends that his arrest was illegal and that, therefore, the charges against him should be dismissed. However, in *State v. Hooper* (1966), 10 Ohio App. 2d 229, the second paragraph of the syllabus states:

"An illegal arrest does not, in itself, invalidate an affidavit filed in a misdemeanor case and is not a proper ground to sustain a motion to quash the affidavit." The United States Supreme Court denied *certiorari* in an appeal from this decision. See *Hooper v. Ohio*, 389 U. S. 923. Subsequently, the conviction was vacated by a United States district court upon other grounds, in a habeas corpus action. The defendant therein was again convicted, and his conviction was confirmed by the Ohio Supreme Court in *State v. Hooper*, 25 Ohio St. 2d 59.

Since the only contention defendant makes with respect to his claim that his arrest was illegal is that the charges against him should be dismissed, it is unnecessary to determine whether or not the director of public safety has the power to make an arrest. Even if he has

not, and the arrest was illegal, this does not constitute grounds for dismissal of the charges.

The third assignment of error is not well taken.

By his fourth assignment of error, defendant contends that his conviction upon the charge of failing to depart after being told to do so is invalid because the affidavit indicates the name of the agent of the school, so ordering defendant, to be "Bruce P. Hennick," whereas the evidence indicates the name of the person so ordering to be the principal of the school, Duane Reed.

Defendant was charged with neglecting or refusing to depart from Linden-McKinley High School after being notified to do so by the agent, or servant, of the owner or occupant thereof, in violation of R. C. 2909.21. An affidavit charging an offense under that section obviously need not specify the name of the agent, or servant, of the owner or occupant who notified the accused to depart from the premises. In other words, had the affidavit omitted entirely any reference to the name of the servant of the school actually ordering the accused to depart, there would be no issue as to the validity of the affidavit. The issue, thus, is whether the insertion of an incorrect name in the affidavit nullifies the conviction upon the charge. The state relies upon R. C. 2941.26, which reads as follows:

"When, on the trial of an indictment or information, there appears to be a variance between the statement in such indictment or information and the evidence offered in proof thereof, in the Christian name or surname, or other description of a person therein named or described, or in the name or description of a matter or thing therein named or described, such variance is not ground for an acquittal of the defendant unless the court before which the trial is had finds that such variance is material to the

merits of the case or may be prejudicial to the defendant."

While that section refers to indictments or informations, it is made applicable to prosecutions for misdemeanors by affidavit by R. C. 2941.35. See *State v. Walker*, 20 Ohio App. 2d 179.

Furthermore, R. C. 2941.30 provides that:

"The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *"

That section also is made applicable to misdemeanors being prosecuted by affidavit by R. C. 2941.35. See *State v. Walker, supra.*

While R. C. 2941.30 does provide that the accused may be entitled to a continuance where an amendment is necessary to cure a variance between the affidavit and the proof, unless the defendant was not misled or prejudiced by the variance, this issue was not raised in the trial court and is being raised by defendant for the first time on appeal. R. C. 2941.30 provides, further "No action of the court in refusing a continuance or postponement under this section is reviewable except after motion to and refusal by the trial court to grant a new trial therefor." That section also provides that there shall be no reversal unless "the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted." In view of the fact that the defendant elected to make no defense but, rather, to rely solely upon his contention that he was entitled to be represented by the out-of-state attorney, Mr. Kunstler, he obviously was not prejudiced in his defense. Defendant has not demon-

strated that a failure of justice has resulted from the variance.

The variance does not constitute a change in the name or identity of the crime charged. Defendant was charged with failing to depart after being ordered to do so. The variance was in the name of the person giving the order, not in the identity of the crime. See *Stewart v. Alvis*, 90 Ohio App. 377; and *State v. Dye* (1968), 14 Ohio App. 2d 7.

We do not feel that the fact that the affidavit was not actually amended requires a different conclusion, inasmuch as the issue was not raised in the trial court. It would have been proper for the trial court to allow the amendment, and had the issue been raised therein, the trial court could have corrected the affidavit to conform to the evidence. R. C. 2941.30, *supra*, expressly provides that such an amendment may be made after trial.

More controlling is R. C. 2945.83 which provides:

"No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

"(A) An inaccuracy or imperfection in the indictment, information, or warrant, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him:

"(B) A variance between the allegations and the proof thereof unless the accused is misled or prejudiced thereby;

"* * *

"(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

It does not affirmatively appear from the record that the defendant was prejudiced or prevented from having

a fair trial by either the variance in the proof from the affidavit or the failure of the prosecution to amend the affidavit at trial. Likewise, it does not appear that the variance between the allegations of the affidavit, and the proof, in the name of the person who gave the order to defendant to depart, misled the accused or prejudiced him, in view of the fact that he offered no defense but, rather, chose to rely solely upon his contention that he had an absolute right to be represented by the out-of-state attorney, Mr. Kunstler. Accordingly, the fourth assignment of error is not well taken.

Inasmuch as the only errors urged by defendant are the four assignments of error which we have considered, the judgment of the trial court must be affirmed.

For the foregoing reasons, the four assignments of error are overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

STRAUSBAUGH and REILLY, JJ., concur.

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

Case No. 72 CV-07-2121

In The Matter Of

CHARLES O. ROSS,

Affidavit of Prejudice
Against

JUDGE GERVAIS FAIS

DECISION and JOURNAL ENTRY

Rendered this 6th day of July, 1972.

Williams, J.

On or about April 6, 1972, Charles O. Ross, defendant in cases number 13205, 13211 and 13212, Franklin County Municipal Court, filed his Affidavit of Prejudice against Judge Fais, then presiding over said cases. This affidavit, together with accompanying memoranda and exhibits were presented to Judge Myron B. Gessaman, Presiding Judge of the Franklin County Court of Common Pleas, in accordance with Section 2937.20, Revised Code for ruling. 2937.20, Revised Code, reads as follows:

> "When a magistrate or a judge of a court inferior to the court of common pleas is interested in a cause pending before him, or is related to or has a bias or prejudice either for or against a party to such cause or to his counsel, or is otherwise disqualified to sit in such cause, on the filing of an affidavit of such party or his counsel, setting forth the fact of such interest, relationship, bias, prejudice, or disqualification, the clerk of such court, or such magistrate,

shall enter the filing of such affidavit on the docket in said cause, and, forthwith notify the presiding "judge, or the chief justice of the court of common pleas, or if there is no such officer, then a judge of the court of common pleas of such county, who shall proceed without delay to examine into said affidavit, and if he finds from all the evidence that such interest, relationship, bias, prejudice, or disqualification exists, he shall designate another magistrate of the township or county, or another judge of said court or the court of common pleas to hear and determine said cause. The judge or magistrate so designated shall proceed to try such cause. Such affidavit must be filed not less than twenty-four hours before the time set for the hearing of said cause, unless such filing is unavoidably prevented.

"This section applies to criminal and civil proceedings."

Because of a pending action in the Federal Court to remove jurisdiction, Judge Gessaman did not rule upon the affidavit. Following a denial of the motion to transfer by the Federal Court, a Petition for Writs of Prohibition and Mandamus was filed in the Supreme Court of Ohio on June 30, 1972, case number 72-503. Among other things, this action seeks an order requiring the Common Pleas Court to assume jurisdiction and rule on a motion to disqualify Judge Fais.

Judge Gessaman is now in vacation and Judge Frederick T. Williams, Administrative Judge of the General Division, is hereby assuming jurisdiction to rule on the matter by virtue of Superintendency Rule 4, the cases' having been set for jury trial on their merits before the Municipal Court on July 10, 1972.

An examination of the various exhibits attached to the plaintiff's file in this matter indicate a considerable amount of notoriety insofar as the case, the judge, the

parties, and their counsel are concerned. It is extremely unfortunate that some cases are apparently tried at press conferences rather than in the court room.

Through various statements and allegations, both in court and outside the court, it would appear that Judge Fais has been goaded into making statements which, combined with his rulings on said motions might be construed as bias on his part against either the defendant or his attorneys.

Perhaps the best summation of the propriety of any judge sitting on a particular case may be found in *Haslam v. Morrison, Judge* 113 Utah 14, at page 20, and quoted in *State, Ex Rel. Pratt v. Weygandt, Chief Justice*, 164 O.S. 463, at page 471, reads as follows:

> "The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts. This is not to say that the mere filing of an affidavit of bias and prejudice, *ipso facto* casts such suspicion on the judge, and upon his integrity and fairness, that he ought to disqualify himself. However, it is ordinarily better for a judge to disqualify himself even though he may be entirely free of bias and prejudice if either litigant files an affidavit of bias and prejudice.
>
> " 'Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness or integrity of the judge.' "

In order to remove any suspicion as to the possibility of prejudice by Judge Fais, this court will disqualify him and appoint a successor Municipal Judge in accordance with Ohio Revised Code Section 2937.20.

Assignment of judges by lot is now required for Common Pleas judges by Superintendency Rule 4. This court

will, therefore, select by lot a judge of the Municipal Court to preside.

Inasmuch as there are eleven other judges, this court will cause their names to be placed on individual, identical slips of paper and Mr. William Boyland for the defense and Mr. Tommy Thompson of the offices of the Franklin County Prosecuting Attorney will draw slips alternately until each has drawn five and the remaining slip will contain the name of the judge who is being assigned. His name will be inserted in this Decision and Journal Entry before filing the same.

IT IS ORDERED that such matter be assigned a Civil Case Number by the clerk of the Franklin County Common Pleas Court and this Decision and Journal Entry be spread on the journals of this court.

IT IS FURTHER ORDERED that a copy of this Decision and Journal Entry be delivered forthwith to the Honorable C. William O'Neil, Chief Justice of the Ohio Supreme Court; the Honorable Gervais Fais, Judge of the Franklin County Municipal Court; and the Honorable Judge Frank A. Reda who has been selected by lot as hereinbefore prescribed, and who is hereby appointed to serve as judge in Case Numbers 13205, 13211 and 13212, and thereto, pending in the Franklin County Municipal Court.

FREDERICK T. WILLIAMS
Administrative Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 1, 1973.

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*

ARTHUR BANKS,
Petitioner,

No. 73-1332 *vs.*

HON. CALE J. HOLDER,
United States District Judge,
Respondent.

Original Petition for Writ of Mandamus. (TH 72 CR 47)

ORDER

On Petition for rehearing.

We noted in our order dated May 17, 1973, that the answer did not raise the question whether prejudice to the government's case or impairment of the orderly and fair administration of justice (in a broader sense than the infringement of the interests of the petitioner) arising from Mr. Kunstler's public statement, may have justified respondent's order denying Mr. Kunstler's application.

Surely that question was not explicitly raised. The transcript of the April 1 hearing makes it clear that the chief concern of respondent was possible prejudice to petitioner. The statements by Mr. Kunstler which were brought out at the hearing covered a considerable spectrum. A few,

concerning the merits of the controversy, were clearly improper when made publicly by an attorney for a party. Others were expressions of opinion on public matters which could not be subject to any legal restraint. Although the former, if believed by the public, would create opinion adverse to the government, respondent appeared to assume that they, as well as the latter, would irritate members of the public and thus create prejudice against the petitioner. Respondent's preoccupation with possible prejudice to the petitioner is evident from the portion of the finding quoted in our original order and also the following:

> "When petitioning attorney's conduct in the subject cause is reviewed in its entirety, the impact this must have upon potential jurors in the Terre Haute Division of the Court inevitably inures to the detriment of the defendant in the subject cause."

Much of the argument presented on motion for rehearing treats the broader issue, the task of balancing in this type of situation, the interest of the prosecution in obtaining a fair trial and the inherent right of the court to protect the public's interest in the orderly and fair administration of justice, on the one hand, against the defendant's sixth amendment right to counsel of his own choosing.

In considering the broader issue, we conclude that before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of "significant prejudice to the defendant himself" or of "disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." *Magee* v. *Superior Court of City & County of San Francisco*, 8 Cal. 3rd 949, 506 P.2d 1023 (1973). See *Chase* v. *Robson*, 435 F.2d 1059 (7th Cir., 1970).

Because interference with the individual's choice of counsel should be kept to the necessary minimum, in each case the trial court must consider carefully whether a less drastic alternative, such as a narrow injunction limiting particular kinds of public statements, would suffice to protect the other interests at stake. Of course, to the extent that the defendant knowingly and intelligently endorses the conduct of his attorney in making speeches and press releases, he waives his right to claim that he has been denied his sixth amendment right to a fair and impartial trial.

The findings of respondent in this case clearly did not meet this standard. Our independent review of the record reveals that the hearing did not include this broader issue within its focus, and that the evidence with respect to the statements which could be deemed improper would not support such a conclusion.

Petition for rehearing is denied.